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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. AND MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

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SUPREME COURT, U.S.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. AND MATSUSHITA HOLDING CORPORATION,

PETITIONERS,

v.

WALTER MINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE EPSTEIN; JOHN LINDER; JANE ROCKFORD, as trustee of the Michael J. Rockford Trust; MAURICE KARLIN; RUTH KARLIN; BETH ANN KARLIN; BERT P. KARLIN,

Plaintiffs-Appellants,

v.

MCA, INC.; MATSUSHITA ACQUISITION CORPORATION; MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD; MATSUSHITA HOLDING CORPORATION; LEW WASSERMAN; SIDNEY J. SHEINBERG,

Defendants-Appellees.

No. 92-55675
D.C. No.
CV 90-6451-R

Appeals from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted

August 2, 1993—Pasadena, California
Submission Vacated August 13, 1993
Reargued and Resubmitted October 12, 1993

Filed February 27, 1995

Before: William A. Norris, Charles Wiggins,
and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Norris

In 1990, Matsushita Electrical Co. Ltd. ("Matsushita") acquired MCA, Inc. ("MCA") for $6.1 billion. The acquisition was accomplished through a tender offer of $71 per share of MCA common stock.[1]

Lew Wasserman, MCA's chairman and chief executive officer at the time, owned 4,953,927 shares of MCA common stock worth $351,728,817 at the tender price of $71 per share. His cost basis was 3¢ per share. Rather than tender his shares at the tender offer price, Wasserman entered into a separate agreement with Matsushita, known as the "Capital Contribution and Loan Agreement," pursuant to which Wasserman exchanged his shares for preferred stock in a wholly-owned Matsushita subsidiary called "MEA Holdings." [2] Matsushita agreed to fund MEA Holdings by contributing 106% of the tender price multiplied by the number of MCA shares Wasserman exchanged. The MEA Holdings preferred stock Wasserman received pays a dividend of 8.75% annually, is secured by letters of credit, and is redeemable upon the death of either Wasserman or his wife, but in no event earlier than five years from the date of the exchange. Wasserman was 77 at the time. It is not disputed that the transaction was designed to be a tax-free exchange of Wasserman's MCA stock under Internal Revenue Code § 351(a), 26 U.S.C. § 351(a) (1994). [3]

Sidney Sheinberg, MCA's chief operating officer at the time of Matsushita's tender offer, owned approximately 1,179,635 shares of MCA common stock. He tendered these shares pursuant to Matsushita's $71 per share offer and received in exchange consideration worth approximately $83,754,085. Two days after Matsushita accepted all tendered shares, Sheinberg received an

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[1] Tendering shareholders received $66 in cash and $5 worth of stock in WWOR-TV, a television station that was spun-off from MCA because of legal restrictions on foreign ownership of domestic broadcast stations.

[2] Wasserman also received for each of his shares the $5 worth of stock in WWOR-TV that all tendering shareholders received.

[3] Upon the death of Wasserman or his wife, the basis of all their community property, including the Matsushita preferred stock, would "step up" to its fair market value. *See* Internal Revenue Code §§ 1014, 2032.

additional $21 million in cash, ostensibly in exchange for unexercised MCA stock options.

These consolidated appeals arise out of actions brought in the United States District Court for the Central District of California by former MCA shareholders[4] who tendered their shares for the $71 tender price. They claim that Matsushita violated SEC Rule 14d-10, 17 C.F.R. § 240.14d-10 (1994), by treating Wasserman and Sheinberg differently from other shareholders in the tender offer. Rule 14d-10, known as the "all-holder, best-price" rule, requires bidders to treat all shareholders on equal terms. [5]

The district court denied plaintiffs' motion for summary judgment on their claim that Matsushita's agreement to pay Wasserman consideration that was different from the $71 per share tender offer violated Rule 14d-10, and later granted Matsushita's motion for summary judgment on this claim.[6] We reverse, instruct the district court to grant plaintiffs' motion for partial summary judgment, and remand for further proceedings to determine the amount of damages, if any, that plaintiffs are entitled to recover as a result of the Wasserman transaction.

The district court granted Matsushita's motion for summary judgment on all of plaintiffs' claims. As noted above, with respect to plaintiffs' claim that the Wasserman transaction violated Rule

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[4] The consolidated appeals involve two sets of plaintiffs, each of whom filed separate complaints. Walter Minton ("Minton") brought this action in his individual capacity. Lawrence Epstein, John Linder, Jane Rockford, Maurice Karlin, Ruth Karlin, Beth Karlin, and Bert Karlin ("Epstein plaintiffs") brought suit both individually and on behalf of all MCA shareholders at the time of the tender offer.

[5] Plaintiffs also claim that the Wasserman and Sheinberg transactions violated SEC Rule 10b-13, 17 C.F.R. § 240.10b-13 (1994). The district court dismissed this claim, pursuant to Fed. R. Civ. P. 12(b)(6), for want of a private right of action. On the facts of this case, any relief plaintiffs could obtain under Rule 10b-13 is also available under Rule 14d-10. *See Field v. Trump*, 850 F.2d 938, 946 n.3 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). We therefore do not consider plaintiffs' Rule 10b-13 claim.

[6] Plaintiffs did not seek summary judgment on their claim that the $21 million payment to Sheinberg also violated Rule 14d-10.

14d-10, we reverse. With respect to plaintiffs' claim that the Sheinberg payment violated Rule 14d-10, we vacate and remand for further proceedings to determine whether the $21 million Sheinberg payment was in fact a premium paid to encourage Sheinberg to tender his shares.[7]

We also reverse the district court's orders denying the Epstein plaintiffs' motions for class certification and leave to amend their complaint.

During the pendency of these consolidated appeals, the Delaware Court of Chancery entered a judgment approving the settlement of a state class action that released all claims arising out of Matsushita's tender offer for MCA stock, including the Williams Act claims raised in the Epstein class action. Matsushita argues that the settlement of the Delaware class action precludes the federal claims raised in the Epstein action. We disagree and hold that the settlement of the Delaware class action does not preclude the Epstein class action.

I. Private Right of Action under Section 14(d)(7)

The SEC's statutory authority to promulgate Rule 14d-10 derives from sections 14(d)(6) and 14(d)(7) of the 1968 Williams Act Amendments to the Securities Exchange Act of 1934.

[7] Plaintiffs also argued in the district court and initially on appeal that MCA, Wasserman, and Sheinberg themselves should be held liable for aiding and abetting Matsushita's alleged violation of Rules 14d-10 and 10b-13. The district court dismissed this claim for failure to state a claim. Fed. R. Civ. P. 12(b)(6). In light of *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994), the Epstein plaintiffs now concede that the district court's judgment dismissing the aiding and abetting claims against MCA, Wasserman, and Sheinberg must be affirmed. Plaintiff Walter Minton, however, maintains that Wasserman and Sheinberg may still be held liable, notwithstanding *Central Bank*, for *conspiring* to violate Rules 14d-10 and 10b-13. We reject Minton's attempt to avoid Central Bank's restrictions on private aiding and abetting actions by using the label "conspiracy." Nothing in the language of Rule 14d-10, which imposes restrictions on the activities of "bidder[s]," or in the language of Rule 10b-13, which speaks of "person[s] who make[ ] a cash tender offer," suggests that liability may be imposed upon shareholders who are the beneficiaries of a bidder's violation of these rules. We therefore affirm the dismissal of plaintiffs' claims against MCA, Wasserman and Sheinberg.

15 U.S.C. § 78n(d)(6), (7) (1981).[8] Matsushita [9] makes the threshold argument that it cannot be sued by MCA shareholders for violating Rule 14d-10 because Congress did not intend sections 14(d)(6) and 14(d)(7) to be privately enforceable. [10] In advancing this argument, Matsushita asks us to create a conflict

[8] In *Robertson v. Dean Witter*, 749 F.2d 530 (9th Cir. 1984), we held that an agency rule contains a private right of action if Congress intended the statute under which it was promulgated to be privately enforceable. *Id.* at 536. While the parties agree that Rule 14d-10 was promulgated under sections 14(d)(6) and 14(d)(7) of the Williams Act, plaintiffs contend that the SEC also issued the Rule to implement section 14(e). Because we hold that Congress intended section 14(d)(7) to be privately enforceable, we need not address the relationship between section 14(e) and Rule 14d-10.

[9] In its brief, Matsushita did not argue that Rule 14d-10 does not contain a private right of action. Instead, it argued solely that Rule 10b-13 is not privately enforceable. Plaintiffs argue that Matsushita in fact conceded that Rule 14d-10 contains a private cause of action by writing that "[i]n addition to SEC enforcement actions and *Rule 14d-10 claims*, stockholders are further protected by Rule 10b-5...." Brief of Matsushita at 47 (emphasis added). Matsushita, however, denies that it made such a concession. *See* Supplemental Brief of Defendants-Appellants at 11 n.11. In a letter submitted to the court several months after oral argument, Matsushita stated that Rule 14d-10 does not contain a private right of action, citing for support *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994), and referring to portions of its brief that discuss only Rule 10b-13. Nonetheless, because an argument concerning whether Rule 14d-10 provides a private right of action appears in the Brief of Wasserman and Sheinberg ("Wasserman Brief"), we will give Matsushita the benefit of the doubt and treat its 28(j) letter as incorporating that portion of the Wasserman Brief by reference.

[10] Section 14(d)(6) provides that when more shares are tendered than a bidder is "willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata ... according to the number of securities deposited by each depositor." 15 U.S.C. § 78n(d)(6).

Section 14(d)(7) provides:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

15 U.S.C. § 78n(d)(7).

with the Second and Third Circuits, both of which have held that Congress intended to create a private right of action under section 14(d)(7). *See Polaroid Corp. v. Disney*, 862 F.2d 987, 996 (3d Cir. 1988); *Field v. Trump*, 850 F.2d 938, 946 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *cf. Pryor v. United States Steel Corp.*, 794 F.2d 52, 57-58 (2d Cir.) (holding that section 14(d)(6) also contains a private right of action), *cert. denied*, 479 U.S. 954 (1986). We find the reasoning of the Second and Third Circuits to be persuasive.

In *Field* and *Pryor*, the Second Circuit applied the traditional four-factor *Cort v. Ash* test in deciding whether, in enacting sections 14(d)(6) and 14(d)(7), "Congress intended to create ... by implication ... a private cause of action." *Pryor*, 794 F.2d at 57 (quoting *Touche Ross & Co. v. Redington*, 422 U.S. 560, 575 (1979)). In holding that Congress did intend to create a private right of action the Second Circuit reasoned, first, that both 14(d)(6) and 14(d)(7) "identif[y] [their] beneficiaries and, unlike the bulk of federal securities regulation, confer[ ]a substantive right on those beneficiaries." *Pryor*, 794 F.2d at 57 (cited in *Field*, 850 F.2d at 946). Second, the court found that a private damages remedy was totally consistent with the statutory purpose of protecting injured investors and provided a particularly effective means of enforcing sections 14(d)(6) and 14(d)(7). *Field*, 850 F.2d at 946; *Pryor*, 794 F.2d at 56, 58. Finally, the Second Circuit noted that these claims are not those "traditionally relegated to state law." *Fields*, 850 F.2d at 946; *Pryor*, 794 F.2d at 58.

In *Polaroid*, the Third Circuit relied on *Pryor* and *Field*, but added that the " 'contemporary legal context' informing what Congress perceived itself to be doing when it acted," supported an inference that Congress intended to create a private remedy for violations of section 14(d)(7). *Polaroid*, 862 F.2d at 995 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979)). In 1968, when the Williams Act was enacted, various lower federal courts had construed section 10(b) of the 1934 Act as providing a private cause of action, and the Supreme Court, in *J.I. Case v. Borak*, 377 U.S. 426 (1964), had announced a liberal policy toward inferring private rights of action for securities law

violations generally. See *Polaroid*, 862 F.2d at 995-96. Because Congress enacted the Williams Act in this context, "it is reasonable to conclude that Congress passed the Williams Act with an understanding that courts would construe the Act as creating private remedies that would enforce the provisions of the Act effectively." *Id.* at 996.

Matsushita argues that we should not follow *Pryor*, *Field*, and *Polaroid* because their rationale is inconsistent with our decision in *In Re Washington Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349 (9th Cir. 1987) (en banc) (hereinafter "*WPPSS* "). We reject this argument. In *WPPSS*, we held that section 17(a) of the Securities Act of 1933 did not create a private right of action, *id.* at 1358, but in doing so we hardly sounded the death knell for implied rights of action generally. Instead, like the Second and Third Circuits in *Pryor*, *Field*, and *Polaroid*, we applied the traditional four-factor *Court v. Ash* test, emphasizing two prongs in particular: whether there is an implicit indication, in the statute's language, legislative history, or structure, of legislative intent to create a private remedy, and whether such an implication would be consistent with the underlying legislative scheme.[11] *Id.* at 1353. Like the Third Circuit, further, we focused on the context in which the statute was enacted. *See id.* at 1357 (looking to "contemporary legal context prevailing at the time of any comprehensive reexamination of or significant amendment to" the securities laws in evaluating whether Congress intended to create private right of action under section 17(a) of the 1933 Act). In *WPPSS* we not only found no evidence whatsoever of congressional intent to create a private right of action under section 17(a), but we also indicated that creating an implied private right of action would frustrate the purposes of the legislative scheme. *Id.* at 1355-56. In *Pryor*, *Field*, and *Polaroid*, just the opposite was true.

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[11] In fact, in *WPPSS* we overruled two prior Ninth Circuit cases because of, among other reasons, their failure "to apply the Supreme Court's analysis in *Cort v. Ash*." *WPPSS*, 823 F.2d at 1351.

While we stated in *WPPSS* that we "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide," *id.* at 1353 (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)), we made equally clear that "a private remedy may be inferred from the plain language of the statute, the statutory structure, or some other source." *Id.* The principal difference between this case and WPPSS is the clarity of the statutory language. In *WPPSS*, the statute at issue, section 17(a) of the 1933 Act, states that "[i]t shall be unlawful for any person in the offer or sale of any securities ...(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact...." 15 U.S.C. § 77(q)(a) (1981). Section 14(d)(7), in contrast, specifically endows shareholders with the right to receive any increased consideration offered to other shareholders. It states that whenever any person "varies the terms of a tender offer" by "increasing the consideration offered" to some security holders, "such person *shall pay the increased consideration to each security holder* whose securities are taken up and paid for pursuant to the tender offer ...." (emphasis added). This language, of course, constitutes far more than the "general censure of fraudulent practices" we found insufficient to create an implied right of action in *WPPSS*, 823 F.2d at 1353. Instead, it is "legislation with an unmistakable focus on the benefitted class." *Id.* at 1354.

The structure of section 14(d)(7) also points to Congress' intent to give shareholders the right to sue. If shareholders were not permitted to sue for damages for violations of section 14(d)(7), there would be no way, once a violation has occurred, to enforce the express statutory command that a bidder "shall pay to each security holder" any increased consideration paid to any other security holder.[12] Under section 21(d)(1) of the 1934

[12] Thus section 14(d)(7) stands in sharp contrast with the statute at issue in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), where the Court held that the existence of "elaborate enforcement provisions," including an express citizens suit provision, precluded the inference of additional private causes of action. *Id.* at 14. In contrast, the Williams Act itself contained no remedial provisions whatsoever, despite the fact that its "sole purpose" was the "protection of investors who are confronted with a tender offer." *Pryor*, 794 F.2d at 56 (quoting *Piper v. Chris-*

Act, the SEC's authority to enforce the provisions of the 1934 Act is limited to bringing *injunctive* actions.

Finally, the legal context of section 14(d)(7) of the 1968 Williams Act differed markedly from that of section 17(a) of the 1933 Act. It was not until 1964 that the Supreme Court announced the implied right of action doctrine in *J.I. Case v. Borak*, 377 U.S. 426 (1964). Thus, at the time of passage of the Williams Act, the Court's implied right of action jurisprudence gave Congress reason to think it need not decide the private right of action question itself.

Matsushita also urges us not to follow *Pryor*, *Field*, and *Polaroid* on the ground that these cases are inconsistent with the implied cause of action jurisprudence of the Supreme Court as it exists today. As Matsushita would have us read the Supreme Court's cases, a private right of action would not be recognized unless Congress explicitly created one. For example, Matsushita asserts that the Supreme Court would not interpret section 14(d)(7) as creating a damages remedy for MCA shareholders because Congress did not say explicitly that all "security holders shall have the right to receive" any increased consideration offered to select shareholders. Wasserman Brief at 56.

Matsushita's argument that there has been a recent sea change in the Court's implied right of action jurisprudence is based on wishful thinking, not case law.[13]The argument is essentially the same one advanced by Justice Scalia in his concurring

Craft Indus., 430 U.S. 1, 35 (1977)). Matsushita's reliance on *Nat'l Sea Clammers* in this case is to no avail.

[13] The cases Matsushita does cite simply hold that courts are reluctant to infer causes of action absent an expression of congressional intent. We agree that congressional intent is the touchstone of an implied private right of action, and that a showing of "the utility of the proposed private right," by itself, is insufficient to justify inferring a private cause of action. See Wasserman Brief at 53. At the same time, the Court has stated over and over for the last fifteen years, in the cases Matsushita cites, that "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available," *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979), and that "congressional intent can be inferred from the language of the statute, the statutory

opinion in *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in the judgment), where he urged his colleagues to "get out of the business of implied private rights of action altogether." *Id.* at 192. The problem is that no other justice of the Court has yet to endorse the "get out of the business" approach to implied causes of action. To the contrary, the Court has only recently reaffirmed the vitality of the *Cort v. Ash* test—which the Second and Third Circuits applied in holding that section 14(d)(7) is privately enforceable—as an aid in "determin[ing] 'whether Congress intended to create the private remedy asserted' for the violation of statutory rights." *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 508 n.9 (1990) (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979)); *Suter v. Artist M.*, 112 S. Ct. 1360, 1370 (1992) (applying "the familiar test of *Cort v. Ash*" in concluding that Congress did not intend to make a private remedy available to enforce the Adoption Assistance and Child Welfare Act). Indeed, in *Thompson v. Thompson*, the case in which Justice Scalia called for an end to implied private rights of action, the eight members of the Court who comprised the majority stated that the existence of a private right of action does not require "evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action." *Thompson*, 484 U.S. at 179. Rather, the Court reaffirmed its long-standing view that "as an *implied* cause of action doctrine suggests," Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.* (internal citation and quotation omitted).[14]

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structure, or some other source...." *Karahalios v. Nat'l Fed. of Fed. Employees, Local 1263*, 489 U.S. 527, 532-33 (1989) (internal citation and quotations omitted).

[14] Moreover, as the Third Circuit stated in *Polaroid*, the Court has been sensitive to the legal context in which Congress legislated. *See Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1036 (1992) (applying "same contextual approach used to justify an implied right of action" to determine scope of available remedies); *Thompson v. Thompson*, 484 U.S. 174, 180 (1988) (examining context of legislation "with an eye toward determining Congress' perception of the law that it was shaping or reshaping"); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 (1982) (taking into account the "contemporary legal context" to determine whether Congress thought it was creating implied cause of action); *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979) (same); *id.* at 718 (Rehnquist, J., concurring) (approving implication of private right of action under Title IX solely because, at time of passage, the Court's implied right of action jurisprudence gave Congress reason to think that it need not decide private right of action question itself).

We therefore reject Matsushita's argument that the rationale of *Pryor, Field*, and *Polaroid* is inconsistent with Supreme Court implied private right of action jurisprudence as it exists today.[15] Like the Second and Third Circuits, we believe that the statutory language—that a bidder "shall pay the increased consideration" to a shareholder who was paid less than another shareholder—is more than adequate under existing Supreme Court case law to support a finding of congressional intent to create a private right of action for violations of section 14(d)(7).

In sum, we hold that in enacting section 14(d)(7) of the Williams Act, Congress intended to provide a damage remedy as a means of enforcing its command that every security holder who tenders his shares be paid any "increased consideration" offered to others.

II. The Wasserman Transaction

Captioned the "Equal treatment of securities holders," Rule 14d-10 prohibits a bidder from making a tender offer that is not open to all shareholders or that is made to shareholders at varying prices.[16] The gist of plaintiffs' claims is that Matsushita

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[15] Matsushita also argues that the Supreme Court's recent decision in *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994), requires federal courts to get out of the business of inferring private causes of action from statutes. *Central Bank*, however, is inapposite; it held simply that a private right of action is not available for aiding and abetting actions not authorized by statute.

[16] Rule 14d-10 provides in relevant part:

(a) No bidder shall make a tender offer unless:

(1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and

violated the antidiscrimination requirements of the Rule by paying Wasserman and Sheinberg premiums pursuant to the tender offer.

Negotiations between Matsushita and MCA began in August 1990, when a representative of Matsushita telephoned MCA's financial advisor to express interest in acquiring MCA. During the course of the talks, Matsushita stressed that it wanted Wasserman and Sheinberg to commit their shares to Matsushita in advance of the friendly takeover and to remain in MCA's employment for five years. On the morning of November 26, 1990, Matsushita and Wasserman entered into the Capital Contribution and Loan Agreement, pursuant to which Wasserman agreed to exchange his MCA shares for preferred stock in a subsidiary Matsushita would create called "MEA Holdings."

Performance of the Capital Contribution and Loan Agreement was conditioned on the tender offer in several respects. First, neither Matsushita nor Wasserman was obligated to perform the Agreement if any of the conditions of the tender offer were not satisfied. *See* Capital Contribution and Loan Agreement §7(c), ER 357 Exhibit S at 12. If, for example, Matsushita did not acquire 50% of MCA's common stock as a result of the

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(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer....

(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided*, That:

(1) Security holders are afforded equal right to elect among each of the types of consideration offered; and

(2) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

The SEC promulgated Rule 14d-10 in 1986, in part to codify its view that §14(d)(7) of the Williams Act Amendments to the Securities Exchange Act of 1934 contains an all-holders and a best-price requirement. *See* SEC Release No. 34-22198, 1985 SEC LEXIS 1175 at *2 (July 1, 1985) (stating that under Commission's interpretation of §14(d)(7) "(i) a tender offer must be extended to all holders of the class of securities which is the subject of the tender offer (the 'all-holders requirement'); and (ii) all such holders must be paid the highest consideration offered under the tender offer (the 'best price rule')").

tender offer, the Wasserman deal would be off. Second, the timing of performance was tied to the tender offer. The Wasserman exchange was scheduled to take place "immediately following the time at which shares of MCA Common Stock are accepted for payment pursuant to and in accordance with the terms of the offer...." *Id.* §2(a), ER 357 Exhibit S at 4. Third, the amount of cash Matsushita was required to contribute in order to fund MEA Holdings was dependent upon the tender price, with Matsushita agreeing to contribute to MEA Holdings 106% of the "highest price paid ... for any shares of MCA Common Stock pursuant to the [tender] offer." *Id.* at §1(c), ER 357 Exhibit S at 2. Finally, the redemption value of Wasserman's preferred stock was set as the tender price. *Id.* Thus if Matsushita increased the tender price at the last minute in response to a competitive bid for MCA, Matsushita would have been required to increase both its funding of MEA Holdings and the amount paid upon the redemption of the Wasserman preferred stock.

Moments after signing the Capital Contribution and Loan agreement, Matsushita and MCA announced the $71 per share tender offer. Shareholders were given from the time of the announcement until 12:01 a.m. on December 29, 1990 to tender their shares. The owners of 91% of MCA's common stock did so, and at 12:05 a.m., Matsushita accepted all tendered shares for payment. At 1:25 a.m., Matsushita exchanged Wasserman's shares for MEA Holdings preferred stock pursuant to the Capital Contribution and Loan Agreement. MCA was merged into Matsushita as a wholly owned subsidiary on January 3, 1991.

Whether the Wasserman transaction violated Rule 14d-10 depends upon whether Wasserman received greater consideration than other MCA shareholders "during such tender offer," Rule 14d-10(a)(2), or whether he received a type of consideration not offered to other MCA shareholders "in a tender offer." Rule 14d-10(c).[17]

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[17] Rule 14d-10(c)(1) provides that "Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided*, That: (1) Security holders are afforded equal right to elect among each of the types of consideration offered[.]" At oral argument, counsel for Wasserman and Sheinberg argued for the first time and without authority

Matsushita argues that the Wasserman transaction falls outside the Rule's ambit because it closed *after* the tender offer period expired. The tender offer period, Matsushita contends, ended when it accepted the tendered MCA shares for payment—at 12:05 a.m. on December 29, 1990, one hour and 20 minutes before Wasserman's shares were exchanged. In Matsushita's view, liability under Rule 14d-10 boils down to a pure question of timing: the Rule is simply a "mechanical provision" concerned with "payments to shareholders of a target corporation only *during a specifically-defined tender offer period*." Brief of Matsushita at 23 (emphasis in original). Outside that period, Matsushita insists, "Rule 14d-10 is without effect" because the Rule "is engaged (or not engaged) depending upon *when payment is made*." *Id.* at 23, 35 (emphasis in original).

Although Matsushita argues that Rule 14d-10 is designed to operate only during a "specifically-defined tender offer period," neither the phrase "tender offer period" nor a specific time frame is to be found in the Rule's text. To be sure, section (a)(2) of the Rule prohibits paying one security holder more than another

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that section (c)(1) cannot be violated. Counsel contended that rather than an independent prohibition, section (c)(1) is a "savings clause" designed to create an exception to section (a)(2) of the Rule.

We cannot agree. When different *types* of consideration are offered to different holders of the same class of security, it may be difficult for plaintiffs to prove that one package was more valuable than the other, as section (a)(2) requires. Section (c)(1) obviates the need for plaintiffs to do so. It is a prophylactic rule that entitles a court to presume, if a tender offer fails to make the type of consideration offered to some security holders available to all, that the selectively-offered consideration was "higher consideration" for purposes of section (a)(2). This reading of section (c)(1) is supported by the SEC's comments in releasing Rule 14d-10, to which we are obliged to give substantial deference. *See Stinson v. United States*, 113 S.Ct. 1913, 1919 (1993) (agency's interpretation of own regulations must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation"); *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990), (agency's interpretation of its own regulations is entitled to deference), *cert. denied*, 498 U.S. 1126 (1991). In its release, the SEC stated, under the heading "Alternative Types of Consideration," that "when more than one type of consideration is offered ... [s]ecurity holders ... must be afforded the right to elect among all types of consideration offered." SEC Release No. 34-23421, 1986 SEC LEXIS 1179 at *28 (July 11, 1986).

"during such tender offer." But the term "tender offer," as used in the federal securities laws, has never been interpreted to denote a rigid period of time. On the contrary, in order to prevent bidders from circumventing the Williams Act's requirements, Congress, the SEC, and the courts have steadfastly refused to give the term a fixed definition. Instead, we have held that "[t]o serve the purposes of the Williams Act, there is a need for flexibility in fashioning a definition of a tender offer." *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 950 (9th Cir. 1985).

Even if the language of Rule 14d-10(a)(2) were to provide a measure of support for Matsushita's timing argument, Matsushita would still be unable to account for the language of Rule 14d-10(c), which prohibits a bidder from "offer [ing] ... more than one type of consideration in a tender offer" if shareholders are not permitted to choose between the different types of consideration offered. (Emphasis added). Section (c)(1) makes no mention of payment and no mention of timing. Instead, Rule 14d-10(c)(1) prohibits a bidder such as Matsushita from offering a shareholder, such as Wasserman, not only consideration of greater value than that offered to other shareholders, but also consideration that is different from that offered to other shareholders. It endows each shareholder with the "equal right to elect among each of the types of consideration offered," regardless of when actual payment is made.

The administrative history of Rule 14d-10 underscores how strained Matsushita's timing argument is. It suggests anything but the notion that the SEC intended the Rule to be a mechanical provision concerned not with discriminatory tender offers, but with the timing of payment to favored shareholders. In promulgating Rule 14d-10, the SEC emphasized the need for "equality of treatment among all shareholders who tender their shares." *Id.* at *15 (quoting S. Rep. No. 550, 90th Cong., 1st Sess. 10 (1967)). It further characterized Rule 14d-10 as a substantive provision necessary to achieve the "investor protection purposes of the [1934] Exchange Act" and the Williams Act. SEC Release No. 34-22198, 1985 SEC LEXIS 1175 at *2 (July 1,

1985). At no point in its discussion of the Rule's purposes did the SEC suggest that the Rule's sole focus is the timing of payments.

Matsushita implicitly acknowledges that Rule 14d-10 does not contain a rigid time frame of its own when it urges us to read Rule 14d-10 as incorporating, sub silentio, the time frame set out in Rule 10b-13, which prohibits side purchases "from the time [a] tender offer or exchange offer is publicly announced or otherwise made known ... [to security holders] until the expiration of the period ... during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected." Matsushita justifies fusing elements of two separate regulations by asserting that "for purposes of the Williams Act and the SEC Rules promulgated thereunder," Rule 10b-13 defines the time period of a tender offer. Brief of Matsushita at 24.

Matsushita offers no authority for incorporating Rule 10b-13's time frame into Rule 14d-10. In promulgating the all-holders, best-price Rule in 1986, the SEC gave no hint that its new regulation would be governed by Rule 10b-13's time clock. Nor does the Williams Act fully incorporate Rule 10b-13's timing provisions. Rule 10b-13 prohibits bidders from making side deals during a fixed period of time; it does not purport to serve as a general definition of when a tender offer begins and ends. In fact, in Rule 14d-2, the SEC rejected the notion that Rule 10b-13 timing determines when tender offers *start* for purposes of section 14(d)(7) and the rules promulgated thereunder.[18]

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[18] Under Rule 14d-2, a tender offer begins for purposes of section 14(d)(7) not from the moment of the offer's announcement (as under Rule 10b-13), but at 12:01 a.m. on the *earlier* of the date the tender offer is publicly announced *or* sent to securities holders. *See* Rule 14d-2(a); Rule 14d-2(b)(2)(ii); SEC Release No. 34-22198, July 1, 1985, 1985 SEC LEXIS at *10, 13. Matsushita claims that this provision of Rule 14d-2 does not apply to claims asserted under Rule 14d-10, as opposed to under section 14(d)(7), but they strain to do so. Rule 14d-10 was promulgated to codify the all-holders and best-price requirements in § 14(d)(7), and the SEC stated when proposing the Rule that the § 14(d)(7), and the time frame would carry over to the Rule. *Id.*

We therefore reject Matsushita's timing argument. Indeed, if adopted, it would drain Rule 14d-10 of all its force. Under Matsushita's reading, even the most blatantly discriminatory tender offer—in which large shareholders were paid twice as much as small shareholders—would fall outside Rule 14d-10's prohibition, so long as the bidder waited a few seconds after it accepted all of the tendered shares before paying the favored shareholders. Rule 14d-10's equality requirements, which "expressly preclude bidders from discriminating among holders of the class of securities that is the subject of the offer, either by exclusion from the offer or by payment of different consideration," SEC Release No. 34-23421, 1986 SEC LEXIS 1179 at *10 (July 11, 1986), cannot be so easily circumvented.

An inquiry more in keeping with the language and purposes of Rule 14d-10 focuses not on when Wasserman was paid, but on whether the Wasserman transaction was an integral part of Matsushita's tender offer. If it was, Matsushita violated Rule 14d-10 because it paid him, pursuant to the tender offer, different, and perhaps more valuable consideration than it offered to other shareholders.[19]

Matsushita contends that the Wasserman transaction cannot be deemed a part of the tender offer because it was merely a private exchange of stock, structured to take place after the tender offer finished. But Matsushita's assumption that the Wasserman transaction was private, rather than a part of the tender offer, begs the question. In *Field v. Trump*, 850 F.2d at 944, the Second Circuit held that "[w]hether [an] acquisition of shares in a corporation is part of the tender offer for purposes of the Act cannot be determined by rubber-stamping the label used by the

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[19] If an ostensibly private agreement that pays a particular shareholder a sum greater than the tender price is deemed a part of the tender offer, the tender offer does not end, by definition, until that agreement is performed. Performance of the agreement, including payment of the shareholder, will therefore take place "during the tender offer," in violation of Rule 14d-10(a)(2). Similarly, if one shareholder is offered a different type of consideration than other shareholders in a transaction that is determined to be a part of the tender offer, the bidder has offered more than one type of consideration "in a tender offer" without affording each shareholder the right to choose the package she prefers, in violation of Rule 14d-10(c)(1).

acquiror." To hold otherwise, the court stated, would render "virtually all of the provisions of the Williams Act, including its filing and disclosure requirements," subject to evasion "simply by an offeror's announcement that offers to purchase ... stock were private purchases." *Id.* Thus, the court observed that because the Williams Act and its implementing regulations do not define the term "tender offer," "[c]ourts faced with the question of whether purchases of a corporation's shares are privately negotiated or are part of a tender offer have applied a functional test that scrutinizes such purchases in the context of various salient characteristics of tender offers and the purposes of the Williams Act." *Id.* at 943-44. *See also* SEC Release No. 34-22198, 1985 SEC LEXIS 1175, at *7 (July 1, 1985) ("[T]he fact that ... different consideration is offered to different holders of the same class of securities, does not mean that a tender offer has not been made under the Williams Act. Rather, if such a transaction is found to be a tender offer, then the tender offer would not have been made in compliance with the all-holders requirement").

Because the terms of the Wasserman Capital Contribution and Loan Agreement were in several material respects conditioned on the terms of the public tender offer, we can only conclude that the Wasserman transaction was an integral part of the offer and subject to Rule 14d-10's requirements. Two facts compel this conclusion: first, the redemption value of Wasserman's preferred stock incorporated the tender offer price by reference, and second, the Capital Contribution and Loan Agreement was conditioned on the tender offer's success. If the tender offer failed, Wasserman would have remained the owner of his MCA stock. This is precisely the arrangement Matsushita made with its shareholders through its public tender offer: if an insufficient number of shares were tendered, each shareholder too would have retained ownership of her MCA stock. The deal Matsushita made with Wasserman thus differed from the tender offer in only one material respect—the type (and possibly the value) of consideration provided. Rule 14d-10(c)(1) forbids just such a transaction.

To be sure, the fact that a private purchase of stock and a public tender offer are both part of a single plan of acquisition

does not, by itself, render the purchase a part of a tender offer for purposes of Rule 14d-10. Rule 14d-10 does not prohibit transactions entered into or effected before, or after, a tender offer—provided that all material terms of the transaction stand independent of the tender offer. Thus a bidder who purchases shares from a particular shareholder before a tender offer begins does not violate Rule 14d-10. *See, e.g., Kahn v. Virginia Retirement Systems*, 13 F.3d 110 (4th Cir. 1993) (bidder's *unconditional* private purchase of target's shares two days before tender offer was formally announced did not violate section 14(d)(7) and Rule 14d-10), *cert. denied*, 114 S. Ct. 1834 (1994).

If, in advance of the tender offer, Wasserman had become unconditionally obligated to exchange his MCA shares, the transaction would not have violated Rule 14d-10, even if Matsushita believed that acquiring Wasserman's shares was a first step in acquiring MCA. In such a case, both Wasserman and Matsushita would have assumed the burdens of their agreement despite the risk that an anticipated tender offer would fail, or command a different price. But such a course was not followed. Matsushita sought to acquire MCA *without* purchasing the holdings of individual shareholders block by block and accordingly subjecting itself to the risk that it would end up with a huge investment in MCA stock, but without control. The tender offer device is designed to avoid this risk, but only if holders of the same security are offered precisely the same consideration.

Matsushita argues, in the alternative, that the summary judgment should be affirmed because plaintiffs cannot prove that they suffered injury from the Wasserman deal. This argument, however, confuses the question of whether Matsushita complied with Rule 14d-10 with the question whether plaintiffs may recover damages. By paying Wasserman consideration that it failed to offer to other shareholders, Matsushita violated Rule 14d-10(c)(1). It remains to be determined on remand whether the preferred stock Wasserman received had a value greater than $326,959,182, the value of his 4,953,927 shares at the cash tender price of $66 per share.[20]

[20] Plaintiffs alleged in their complaint that Wasserman received consideration of greater value per share than other shareholders. Matsushita did not

Accordingly, we reverse the summary judgment in favor of Matsushita on plaintiffs' claim that the Wasserman transaction violated Rule 14d-10, reverse the district court's order denying plaintiffs' motion for partial summary judgment that the Wasserman transaction did violate Rule 14d-10, and remand for further proceedings on the question whether the consideration Wasserman received in exchange for his MCA stock had a greater value than what plaintiffs received and, if so, how much greater.

III. The Sheinberg Payment

Unlike Wasserman, Sheinberg tendered his MCA shares for the $71 per share tender price. Pursuant to an amended employment agreement executed shortly before the tender offer was announced on November 26, 1990, MCA agreed, with Matsushita's approval, to pay Sheinberg $21 million if the tender offer succeeded. Two days after Matsushita accepted all tendered MCA shares, Sheinberg received the promised payment.

The parties dispute the purpose of the Sheinberg payment. Plaintiffs contend that it constituted a covert premium of $17.80 per share designed to induce Sheinberg to tender his shares. Matsushita contends that the payment was instead designed both to cash out stock options that MCA had given Sheinberg because

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dispute this allegation in its motion for summary judgment. Moreover, in opposing Matsushita's summary judgment motion, plaintiffs stated, on the basis of the calculations contained in Matsushita's expert witness affidavit and on the fact that dividend payments are not tax-deductible, that Wasserman's preferred stock may have cost Matsushita more than $66 per share in cash. Plaintiffs also point to their own expert's answers to interrogatories that state that Wasserman's preferred stock was in fact worth more than $66 per share. These answers to interrogatories are not in the record because Matsushita did not controvert plaintiffs' allegation that Wasserman's preferred stock was worth more than $66 per MCA share he exchanged. On this record, we believe that plaintiffs have raised a genuine issue of fact as to whether Matsushita gave Wasserman consideration worth more than $66 per share. Matsushita also asserts that to recover damages, plaintiffs must prove not only that they received less consideration package given solely to Wasserman. The plain language of Rule 14d-10 is to the contrary. It requires plaintiffs to prove, as a prerequisite to recovering damages, simply that the consideration paid to Wasserman was "higher" than that paid to other shareholders. We express no view at this time as to the value, if any, that may be attributed to tax benefits Wasserman may have received.

of his performance as its chief operating officer and to compensate Sheinberg for agreeing to amend his employment contract with MCA.

According to the minutes of the MCA Board of Director's meeting of November 25, 1990, the day before the tender offer was announced, Wasserman explained that before discussions with Matsushita began, he had intended to grant Sheinberg options for 1,000,000 shares of MCA stock. ER 357 Exhibit D. He stated, according to the minutes, that when merger negotiations began, "there had been a freeze put on further stock option grants," and he was therefore unable to propose the Sheinberg options at the next meeting. *Id.* at 31. According to the minutes, Wasserman said he believed that it would be unfair to deprive Sheinberg of his legitimate expectations simply because the tender offer was nearly finalized. *Id.* He recommended that the options be granted at an exercise price of $50 per share. *Id.*

Wasserman also told the Board that Matsushita had approved of the Sheinberg options and that it had agreed to give Sheinberg "cash payments if the transaction went forward, measured by the difference between the transaction price" and the $50 option price. *Id.* at 31-32. Martin Lipton, counsel for MCA, Wasserman, and Sheinberg in this transaction, told the Board that Sheinberg's payment would amount to $21 million and that, as further consideration for Matsushita's promise to pay him this sum, Sheinberg would be required to waive his right to severance pay in the event Matsushita acquired MCA and to agree to five years of continued employment. *Id.* at 33. The Stock Awards Plan Committee approved the "arrangements" Wasserman proposed for Sheinberg, "subject to the Board's approval of the proposed merger agreement." *Id.* at 68.

Plaintiffs argue that the Sheinberg payment was entirely conditional upon the success of the tender offer. If the tender offer did not succeed, it is undisputed that Sheinberg would not have received the $21 million. Matsushita points to no evidence in the record indicating that the grant of options to Sheinberg was anything more than hypothetical in the event that the tender offer did not succeed. At the MCA Board meeting, according to the minutes, Wasserman stated that if the merger "did not occur,

he would present the arrangements to the Board for approval and implementation as stock-based awards." *Id.* at 32. From this record a trier of fact could infer that Wasserman's statement was merely a declaration of future intention, not a binding commitment to give Sheinberg stock options regardless of the outcome of the tender offer.

Plaintiffs also point to the absence of any evidence even suggesting that Sheinberg might be in line for an award of stock options before November 25, 1990, the eve of the tender offer. Moreover, they cite the deposition testimony of MCA's financial advisor, Felix Rohatyn, that he could not recollect any discussions of a stock option award to Sheinberg until Wasserman brought up the matter at the November 25 Board Meeting. ER 357 Exhibit A at 32.

Plaintiffs also argue that Matsushita's account of the Sheinberg payment is internally inconsistent. If Matsushita is correct that Sheinberg owned—prior to the day the tender offer was announced—options for 1,000,000 shares of MCA stock, each with an exercise price of $50 per share, it is unclear why Matsushita would claim that the Sheinberg payment was also made in consideration of an agreement to amend his employment contract. The $21 million is ostensibly derived from the difference between the $50 exercise price and the $71 tender price, multiplied by the 1,000,000 option shares.

We hold that plaintiffs' circumstantial evidence gives rise to a disputed issue of material fact and therefore precludes summary judgment for Matsushita on the claim that the $21 million payment to Sheinberg violated Rule 14d-10. A trier of fact could decide, on the evidence cited by plaintiffs, not to credit Matsushita's explanation for the Sheinberg payment.

Matsushita argues, without controverting any of plaintiffs' evidence, that the Sheinberg payment did not violate Rule 14d-10 because (1) the Sheinberg payment was made *after* Matsushita accepted the tendered MCA shares, and (2) the payment was made by MCA, not Matsushita.

We rejected Matsushita's timing argument in the context of the Wasserman transaction, *see* Part II, *supra*, and the fact that

Matsushita repeats the argument in defending the Sheinberg payment only brings into sharp relief its lack of merit.

Moreover, Matsushita's assertion that MCA rather than Matsushita paid Sheinberg[21] begs the question. The central issue regarding the legality of the Sheinberg payment, after all, is whether it constitutes incentive compensation that MCA wanted to give Sheinberg independently of the Matsushita deal, or a premium that Matsushita wanted to give Sheinberg as an inducement to support the tender offer and tender his own shares. The mere fact that MCA cut Sheinberg's $21 million check just before it was formally merged into Matsushita may be a relevant fact, but it does not establish as a matter of law that the $21 million Sheinberg payment did not violate Rule 14d-10.

Because Matsushita's liability under Rule 14d-10 for the Sheinberg payment turns on disputed questions of material fact, we vacate the summary judgment for Matsushita on this claim and remand for further proceedings. *See* Fed. R. Civ. P. 56(c).

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[21] The only authority Matsushita cites for this argument is *Kramer v. Time Warner*, 937 F.2d 767 (2d Cir. 1991). *Kramer*, however, is inapposite. That case involved Time Incorporated's two-step acquisition of Warner Communications: first a tender offer, then a statutory merger. Time acquired 51% of Warner's common stock pursuant to the tender offer and the remaining 49% pursuant to the second-step statutory merger.

The Second Circuit held that Rule 14d-10 was not violated when Warner paid its top executives different consideration than ordinary shareholders received in the second-step statutory merger. The court reasoned that a statutory merger following a successful tender offer for 51% of a target's shares is not a tender offer for purposes of the Williams Act. *Id.* at 779. Distinguishing *Field v. Trump*, 850 F.2d at 938 (holding that claim exists under Williams Act when offeror withdraws initial tender offer on the same evening he privately secures dissident shareholders' stock only to then renew tender offer next morning), the Second Circuit held: "The claim that the Williams Act applies to second-step statutory mergers is ... meritless." *Id.* The instant case is distinguishable from *Kramer* for the same reason *Field v. Trump* is. As in *Field v. Trump*, no statutory merger, only a tender offer, is involved here.

IV. The Preclusive Effect of the Settlement of the Delaware Class Action

Before addressing the Epstein plaintiffs' argument that the district court abused its discretion in denying their motion for class certification, we consider Matsushita's claim that the Epstein class action is barred by the judgment of the Delaware Court of Chancery settling the state class action. Although the Delaware class action was based exclusively on state law claims, the settlement agreement expressly stated that the federal securities law claims asserted in the "*Epstein* action ... are hereby compromised, settled, released and discharged with prejudice...." *In re MCA, Inc. Shareholder Litig.*, Order and Final Judgment (No. 11740) (Feb. 22, 1993), at 3-4.

Matsushita makes a two-pronged preclusion argument. First, it argues that the Delaware judgment releasing the federal claims is entitled to preclusive effect as a matter of full faith and credit. Second, Matsushita argues that the release of the federal claims bars the Epstein action as a matter of contract.[22]

A. The Delaware Settlement

The Delaware class action was filed on September 26, 1990, the day the financial press reported that Matsushita was negotiating to buy MCA. The suit named as defendants MCA and its directors, including Wasserman and Sheinberg. The essence of the complaint was that MCA's directors had breached their fiduciary duties by failing to implement a market check mechanism to maximize shareholder value upon a change of corporate control, as required by *Revlon, Inc. v. MacAndrews & Forbes Holdings Inc.*, 506 A.2d 173, 182 (Del. 1986).

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[22] The settlement agreement permitted state class members to opt out. Although the Epstein plaintiffs did not opt out, 19 shareholders, including plaintiff-appellant Walter Minton, chose to do so. It is undisputed that shareholders who opted out may continue to pursue their federal claims regardless of the preclusive effect of the Delaware settlement on the Epstein class action.

On December 2, 1990, three days after public disclosure of the terms of the tender offer, the Epstein class action was filed in the Central District of California. Unlike the state action, the Epstein complaint named Matsushita as a defendant and claimed that the tender offer violated SEC Rules 14d-10 and 10b-3.

On December 4, 1990, the day after the Epstein action was filed in the Central District, lead counsel for the Delaware plaintiffs transmitted a letter to MCA's counsel that was to serve as the basis of an amended complaint. In that letter, the Delaware plaintiffs stated their intention to add additional claims against all directors. In particular, the complaint was amended to allege that MCA was wasting corporate assets by increasing its exposure to liability for violations of Rules 10b-13 and 14d-10, that directors Wasserman and Sheinberg had breached their fiduciary duties by negotiating preferential deals with Matsushita, and that MCA failed to make full disclosure of the benefits MCA insiders would receive from the takeover. Finally, Matsushita was added as a defendant and charged with conspiring with and aiding and abetting MCA directors in violating Delaware law.

On December 11, 1990, a week after Delaware class counsel's letter proposing to amend the complaint and add Matsushita as a defendant, the defendants reported to the Central District that they had reached a settlement of the Delaware class action "in principle." On December 14, the amended complaint was filed in the Court of Chancery, and on December 17, the parties agreed on the terms of a settlement to be submitted to the Vice Chancellor for approval. The settlement provided for the payment of $1,000,000 in fees to class counsel, but no monetary benefit for class members. The only arguable benefit to class members was a proposed change in the poison pill of the new corporation that was to be formed to own MCA's radio station if the tender offer succeeded. The Vice Chancellor found the value of this poison pill provision to class members to be "illusionary." *See In re MCA Shareholder Litig.*, Inc., 598 A.2d 687, 696 (1991). Finally, the settlement provided for the release of all claims arising out of the tender offer, both state and federal.

In defending the settlement before the Vice Chancellor on January 30, 1991, class counsel argued that the state claims, while not frivolous, had little merit. Counsel also argued that the federal claims were frivolous and should not be pursued. On April 22, 1991, the Vice Chancellor disapproved the proposed settlement. He agreed with class counsel that the state law claims being compromised were "at best, extremely weak and, therefore, have little or no value." *In re MCA, Inc. Shareholder Litig.*, 598 A.2d at 694. In particular, he found the state claim of preferential treatment for Wasserman and other directors to be "weak" because no such state cause of action existed. *Id.* Under Delaware law, the Vice Chancellor noted, "[a] shareholder is not prohibited, by his status as a director, from dealing in shares of the corporation," and that a director breaches his duty of loyalty only if he uses inside information for his personal benefit. *Id.* Finding that the value of the settlement to the class lacked any "real monetary benefit," the Vice Chancellor rejected the settlement because of the "significant value" of the federal claims that would have been released along with the valueless state claims. *Id.* at 696, 690.

Despite the Vice Chancellor's opinion that the state claims had no merit and no value, Matsushita and its co-defendants took no action to dismiss the Delaware action. In fact, the docket of the Court of Chancery reflects no action of any kind—no discovery, no motions, no settlement or status conferences—until after the Central District awarded summary judgment to the defendants in the federal actions in February, 1992, more than a year after the Vice Chancellor disapproved the original Delaware settlement.

On October 22, 1992, after the federal plaintiffs filed their notices of appeal of the summary judgment to the Ninth Circuit, the parties to the Delaware action entered into a new settlement agreement. It provided for the creation of a $2 million settlement fund, enough to pay shareholders two to three cents per share *before* payment of fees and costs.[23] Like the first settlement

[23] Class counsel's request of over $691,000 in fees was reduced by the Vice Chancellor to $250,000, which in turn reduced the amount available for class members to $1,750,000.

agreement, the second agreement provided for the release of all claims arising out of Matsushita's acquisition of MCA, both state and federal. Unlike the first agreement, the second settlement agreement permitted class members to opt out.[24]

The Vice Chancellor approved the second settlement agreement, concluding that "it is in the best interests of the class to settle this litigation and the terms of the settlement are fair and reasonable — although the value of the benefit to the class is meager." *In re MCA, Inc. Shareholder Litig.*, 1993 WL 43024, at *1 (Del. Ch. Feb. 16, 1993). He approved the second settlement for the sole reason that the federal claims which he originally thought had "significant value," had been reduced to "minimal economic value" by the summary judgment entered in the Central District. The Vice Chancellor uncritically accepted the summary judgment as having destroyed the value of the federal claims without considering the fact that the Ninth Circuit reviews summary judgments de novo. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629 (9th Cir. 1987). The Vice Chancellor downgraded the value of the federal claims even as he expressed reluctance to assess the merits of those claims because they were "outside the jurisdiction of this Court." *Id.* at *4.

Objectors argued that the settlement was collusive because the defendants "cut a deal" with the named plaintiffs in the Delaware action and their attorneys in order to extinguish the claims pending in the federal litigation. *In re MCA, Inc. Shareholder Litig.*, WL 43024, at *5. The Vice Chancellor acknowledged that the potential for this type of abuse "clearly exists in representative litigation," and that "suspicions abound" when "the settling parties have previously proposed a patently inadequate settlement in which the class would have received no monetary benefit but the attorneys would have received $1 million in fees." *Id.* at *4. Nonetheless, he refused to make a finding of collusion on the record before him because objectors "offered no evidence of any collusion." *Id.* at *5.

[24] Notice describing the settlement was sent to all class members, which included the Epstein plaintiffs. None of the Epstein plaintiffs appeared in the Delaware court to object to the terms of the settlement.

The judgment incorporating the terms of the settlement was summarily affirmed by the Delaware Supreme Court. *In re MCA, Inc. Shareholders Litig.*, 633 A.2d 370 (Del. 1993).

B. The Full Faith and Credit Question

1. *The Jurisdiction of State Courts to Release Exclusively Federal Claims in a Class Settlement*

Matsushita first argues that the Epstein action is precluded because the Delaware judgment releasing the federal claims is entitled to full faith and credit. As a general rule, the Full Faith and Credit Act, 28 U.S.C. §1738, "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). This rule does not apply, however, if the state court "did not have jurisdiction over the subject matter or the relevant parties." *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accidental Health Insurance Gty. Ass'n*, 455 U.S. 691, 704-705 (1982). *See also Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 283 (1980); *Durfee v. Duke*, 375 U.S. 106, 110 (1963); *Grubb v. Public Util. Comm'n*, 281 U.S. 470, 475 (1930); *Thompson v. Whitman*, 85 U.S. 457, 469 (1873).[25] The Epstein plaintiffs argue that the Delaware class

[25] The Delaware Court of Chancery determined that it was jurisdictionally competent to enter a judgment settling the class action. As a general rule, we are not at liberty to entertain a collateral attack on a state court's determination of its own subject matter jurisdiction. *See Durfee v. Duke*, 375 U.S. at 111. As the Supreme Court went on to say in *Durfee*, however, "the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling." *Id.* at 114. The *Durfee* Court concluded that when "the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its own jurisdiction," collateral attack on a state court's exercise of jurisdiction is warranted. *Id.* at 114 n.12.

In this case the policy of finality of judgments is plainly outweighed by the federal interest in reviewing a state court's exercise of judicial power over claims which Congress has vested exclusively in federal courts. Section 14(d)(7) of the Williams Act, granting exclusive jurisdiction to the federal courts, embodies beyond cavil, "a highly important federal policy calling for unified and comprehensive proceedings in federal court." *Wright & Miller* § 4428, at 285. *See Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985). When Congress has expressly denied state courts jurisdiction over an important area of federal law, and a state court nonetheless exercises judicial power over it, the potential for disrupting the distribution of governmental power is great. In such a context, the doctrine of federal pre-emption would control, and collateral attack on the state court's exercise of jurisdiction would be appropriate. *See Durfee*, 375 U.S. at 114.

settlement is not entitled to full faith and credit to the extent it released federal claims which are beyond the subject matter jurisdiction of state courts.

Matsushita responds that courts have uniformly held that

> a state court class action settlement properly may preclude, by release, continued litigation by members of the class of all claims—state or federal, whether or not within the exclusive jurisdiction of the federal courts—arising out of the same subject matter or transaction.

Supplemental Brief of Matsushita at 13. In other words, Matsushita reads existing case law as sanctioning the release of exclusively federal claims in the settlement of state class actions as long as the state and federal claims arise out of the same subject matter or transaction. We believe Matsushita's argument represents an overly expansive reading of the case law. As we read the cases, they support only a limited state court power to release exclusively federal claims in a class action settlement.

Of all the cases cited by Matsushita, only two, *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S.Ct. 480 (1994) and *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), implicate the Supremacy Clause because in each, as here, a state court extinguished exclusively federal claims in settling a state class action.[26]

[26] Matsushita also relies on one case, *Abramson v. Penwood Investment Corp.*, 392 F.2d 759 (2d Cir. 1968), which did not involve a class action. We deal with this case in the section addressing Matsushita's contract bar argument. *See infra* note 32.

In every other case cited by Matsushita, the state court had subject matter jurisdiction to adjudicate all the claims that were released in the class settlement. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287-89 (9th Cir.), *cert. denied*, 113 S.Ct. 408 (1992), for example, did not present the question of the preemptive effect of an exclusive federal jurisdiction statute on the power of a state court to release exclusively federal claims in settling a class action. Rather it involved the settlement of a *federal* class action based upon alleged violations of the federal securities laws. Our holding in *Class Plaintiffs* was that the Eleventh Amendment did not bar a federal district court from releasing claims against the State of Washington as part of a class settlement because the State had waived its sovereign immunity by participating in the settlement negotiations and consenting to be bound by the settlement agreement. *Id.* at 1289.

For the same reason, *In Re Corrugated Container Antitrust Litig.*, 643 F.2d 196 (5th Cir. 1981), did not implicate the Supremacy Clause because the jurisdictional competence of a state court to release exclusively federal claims was not at issue. The holding of the Fifth Circuit was that a federal district court, in approving a class settlement of federal claims, had jurisdictional competence to extinguish state claims that were not pleaded, but which it had pendent jurisdiction to adjudicate. 643 F.2d at 221 n.39.

TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456 (2d Cir. 1982), was also not a Supremacy Clause case because it too involved the approval of a class action settlement by a federal district court. In *TBK Partners*, the Second Circuit upheld a class settlement that extinguished state claims that were not pleaded and arguably beyond the jurisdiction of the district court to adjudicate. *Id.* at 460. Although not directly on point because it was not a preemption case—it did not involve the release of exclusively federal claims by a state court—*TBK Partners* is useful authority because it announced a principled test for limiting the preclusive effect of a judgment based upon a class settlement. Writing for the court, Chief Judge Newman reasoned,

> we see no reason why the judgment upon settlement cannot bar a claim that would have to be based on the *identical factual predicate* as that underlying the claims in the settled class action. We have previously "assume[d] that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint *but depending [[[][on the very same set of facts." National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 n.7 (2d Cir. 1981).

Id. at 460 (emphasis added). Thus the Second Circuit gave preclusive effect to the settlement judgment's release of unpleaded state claims because the same facts were "at the core" of both the unpleaded state and the pleaded federal claims. *Id.* Had the judgment been based upon an adjudication rather than a settlement of the federal claims, the unpleaded state law claims would have been barred by the doctrine of issue preclusion because they turned on the "very same set of facts."

In applying an issue preclusion test to limit the preclusive effect of a judgment approving a class settlement, *TBK Partners* followed Judge Friendly's reasoning in *National Super Spuds*: " '[i]f a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." ' *Id.* at 462 (quoting *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d at 18). Thus, in *TBK Partners*, the Second Circuit upheld the release of unpleaded claims in a settlement judgment which would have been barred by the issue preclusive effect of a judgment based upon an adjudication of the pleaded claims.

As we read *TBK Partners*, Matsushita's reliance on it as "dispositive" authority for its argument that we should give preclusive effect to the Delaware settlement judgment merely because the state and federal claims arise out of the same transaction is completely misplaced. First, *TBK Partners* is not a Supremacy Clause case. Second, *TBK Partners* announced and applied an issue preclusion test, not an "arising out of the same transaction" test, in defining the limits on a court's power to

release claims in a class settlement. As the Second Circuit summed up in *TBK Partners*:

> [w]e therefore conclude that in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim *based on the identical factual predicate* as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.

Id. at 460 (emphasis added).

We now turn to the only two cases cited by Matsushita that involved the preclusive effect of a state court judgment approving a class action settlement that included a release of exclusively federal claims. In both cases *TBK*'s issue preclusion test was applied; in neither case was Matsushita's "arising out of the same transaction" test applied. In *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d at 29, the First Circuit, citing *TBK Partners*, applied an issue preclusion test in holding that the release of exclusively federal claims in a state court settlement judgment was entitled to preclusive effect. Tracking the reasoning of both *TBK Partners* and *National Super Spuds*, the First Circuit's rationale was that the federal claims depended on the same underlying facts as the state claims — the failure of a corporation to disclose allegedly material facts in a proxy statement. *Id.* at 30-31, 33.

In *Grimes v. Vitalink Communications Corp.*, 17 F.3d at 1553, the Third Circuit followed the First Circuit's lead in Nottingham Partners in applying *TBK Partners'* issue preclusion test. The district court, citing *TBK Partners and Nottingham Partners*, had held "that this federal securities case is barred by the collateral estoppel effect of the Delaware judgment [releasing those claims as part of a class settlement]...." *Id.* at 1556. The Third Circuit affirmed because the "facts that underlie the federal non-disclosure claims were actually litigated during the state court proceeding and were conclusively resolved against the objectors, here the federal plaintiffs." *Id.* at 1562.

Thus, the cases cited by Matsushita fail to support its contention that we should give preclusive effect to the Delaware settlement judgment because the federal claims it released arose out of the same transaction as the state claims. Instead, these cases stand for a more restrictive limitation on the power of state courts to extinguish exclusively federal claims in approving class action settlements: a state court may release exclusively federal claims that would have been extinguished by the issue preclusive effect of an adjudication of the state claims.

National Super Spuds and *TBK Partners* together provide the doctrinal framework for using issue preclusion in determining the limits of judicial authority to release unpleaded claims in settling class actions. But though neither *National Super Spuds* nor *TBK Partners* involved the preemptive effect of an exclusive federal jurisdiction statute on the reach of state judicial power in settling class actions, both involved the release of unpleaded state claims by federal district courts which had or may have had pendent jurisdiction to adjudicate the claims. Nonetheless, in both cases the Second Circuit recognized the importance of limiting judicial authority generally to release unpleaded claims in class settlements.

Nottingham Partners and Grimes, in contrast, did implicate the Supremacy Clause because, as in the instant case, exclusively federal securities claims were extinguished by a state court judgment approving a class settlement. In both cases, the judgment was given preclusive effect because the state and federal claims arose out of the identical factual predicate. In other words, had the judgment followed an adjudication rather than a settlement, it would necessarily have resolved the federal claims as a matter of issue preclusion.

In deciding the preclusive effect of the Delaware judgment at issue in this case, we need not decide whether to follow *Nottingham Partners and Grimes* in giving preclusive effect to a class action settlement that releases exclusively federal claims that turn on the same underlying facts as the state claims. All we need decide today is whether to break new ground in giving preclusive effect to a state court judgment that extinguishes exclusively federal claims that are factually unrelated to the state

claims pleaded in the class action.[27] The question of first impression confronting us is whether Congress, in denying state courts subject matter jurisdiction over 1934 Act claims, intended to leave state courts with the power to extinguish exclusively federal claims by approving a class action settlement that could not have been extinguished by adjudicating the class action. We can imagine no reason for imputing such an intent to Congress. We recognize that Congress could reasonably have been concerned about accommodating the interests of state courts in "achiev[ing] a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action," *TBK Partners*, 675 F.2d at 462, but that concern would not be served by authorizing state courts to settle questions *not* at the core of a class action.

The very cases Matsushita relies upon counsel against an expansive state court power to release exclusively federal claims. In applying an issue preclusion test rather than a "same transaction" test, the cases embrace Judge Friendly's common sense reasoning that a court's jurisdiction to extinguish claims by class settlement should not exceed its jurisdiction to extinguish claims by adjudication. Ignoring this reasoning, Matsushita asks us to impose a "same transaction" test without offering logic or precedent in support of such a test.[28] As we shall now show, the federal claims extinguished by the Delaware judgment could not have been extinguished by the issue preclusive effect of an adjudication of the state claims because, although the federal and state claims arose out of the same transaction, they are based upon different underlying facts.

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[27] See *infra* part IV.B.2.

[28] The "arising out of the same transaction" test is, of course, used in claim preclusion doctrine. *See* Restatement (Second) of Judgments § 24 (1981). However, Matsushita, as it must, expressly disclaims reliance on claim preclusion. *See Clark v. Watchie*, 513 F.2d 994, 997 (9th Cir. 1975) (state court judgment can have no claim preclusive effect on exclusively federal securities claims).

2. *The Disparity Between the State and Federal Claims*

Matsushita makes no attempt to argue that any of the Williams Act claims of the Epstein plaintiffs share any predicate facts in common with the state law claims that formed the basis of the Delaware class action. Instead, Matsushita rests its preclusion argument solely on the fact that the claims arose out of the same transaction—Matsushita's acquisition of MCA.

The gravamen of the federal class action is that Matsushita violated SEC Rules 14d-10 and 10b-13 by offering greater value for the stock of Wasserman and Sheinberg than it offered for the stock of other shareholders.[29] Thus the legal theory underlying the federal claims is that Matsushita breached a duty to shareholders that is imposed on tender offerors by federal securities laws. The relevant factual inquiry is whether Wasserman and Sheinberg received greater consideration than other MCA shareholders during the tender offer, section 14d-10(a)(2), or a type of consideration not offered to other MCA shareholders. § 14d-10(c)(1).

The gravamen of the state class action is that MCA directors breached their fiduciary duty of care to MCA as imposed by Delaware law. First, the Delaware plaintiffs claimed that MCA's directors breached their fiduciary duty by failing to take steps to maximize shareholder value upon a change of corporate control as required by *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d at 182. Plainly, this *Revlon* claim turns on different fact issues than the federal securities claims do. The question whether the MCA directors took the steps required by *Revlon* to assure maximum shareholder value is completely distinct from the question whether Matsushita violated the Williams Act by extending preferential treatment to some of the shareholders in making the tender offer.

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[29] Wasserman, Sheinberg, and MCA were also named as defendants and charged with aiding and abetting Matsushita. *See supra* note 7. Because the Epstein plaintiffs concede that the district court's dismissal of this claim was appropriate, we do not address this claim further.

The second state claim was that MCA's directors breached their duty of candor by failing to disclose to the shareholders information concerning the merger such as the compensation packages MCA officers received under the terms of the merger agreement. But whether or not the MCA directors breached their fiduciary duty by failing to make disclosures has no bearing on whether directors received preferential treatment from Matsushita in violation of the Williams Act.[30]

The third state claim was that the defendants breached their fiduciary duty of loyalty by making preferential arrangements for themselves as part of the tender offer, and that Matsushita aided and abetted the MCA defendants in this breach. At first glance, this claim appears to be at least in the same ball park as the Rule 14d-10 claim. However, although this state claim is no doubt artfully drafted to resemble the 14d-10 claim, there is in fact no Delaware statutory or common law rule that prohibits a shareholder from obtaining the best deal for himself as part of a change of corporate control.[31] Thus, adjudication of the claim

[30] The Delaware plaintiffs also alleged that MCA and Matsushita "subjected MCA to potential liability under Rules 14d-7, 14d-10, 10b-13, and 13e-3, ... thereby causing MCA to expend and waste corporate assets...." Amended Complaint at 11. There is, to state the obvious, no cause of action in Delaware for violating the federal securities laws, and there would thus be no issue preclusion if these claims were litigated on the merits in Delaware. Indeed, the Delaware Vice Chancellor did not address the settlement value of these claims in his opinion. The fact that the lawyers for the Delaware plaintiffs inserted such a claim into their amended complaint (not to mention that they did so the day after the *Epstein* action was filed) does little more than make readily apparent the extent to which the state suit was structured with an eye toward the preclusive effect it might have on the federal claims pending in the Central District of California.

[31] In rejecting the first proposed Delaware settlement, the Chancery Court observed that a shareholder is only prohibited from negotiating a preferential deal for himself if he uses inside information to do so. *In re MCA, Inc. Shareholder Litig.*, 598 A.2d at 694. Indeed, as Wasserman and Sheinberg rightly observe, under Delaware law, "Wasserman would have been fully entitled to have held out for a premium in return for agreeing to sell his own MCA shares to Matsushita." Brief of Wasserman and Sheinberg at 14; *see also Citron v. Steego Corp.*, 1988 Del Ch. LEXIS 119, at *21 (Del. Ch. Sept. 9, 1988) (Allen, C.) ("Our law does not regard a control premium as a corporate asset that must be shared among all shareholders"). Rule 14d-10, in contrast, does prohibit a shareholder from receiving more, or even different, consideration in the course of a tender offer. Unlike Delaware law, it does prohibit the payment of control premiums in the course of a tender offer. Indeed, Rule 14d-10 was promulgated precisely to prohibit practices that Delaware permits. *See Polaroid Corp. v. Disney*, 862 F.2d 992.

would not have raised a question of fact whether Wasserman or Sheinberg received preferential treatment from Matsushita.

In sum, the state and federal claims are completely disparate. The only thing they share in common is that they arise out of the same transaction, which is the sole nexus Matsushita relies upon in arguing that the Delaware judgment's release of the federal claims is entitled to full faith and credit.

Since the Delaware class action settlement judgment in this case attempted to extinguish exclusively federal claims which it could not have extinguished through adjudication, we hold that the decree exceeds the jurisdiction of the state court and, therefore, is not entitled to full faith and credit.

C. The Contract Bar Argument

Matsushita argues that regardless of the "technical res judicata effect" of the Delaware judgment, the Epstein plaintiffs are barred from litigating their Williams Act claims in federal court as a matter of contract. As Matsushita puts it, "just as an individual plaintiff may, as a part of a settlement in state court, agree to release exclusively federal claims, so, too, may a class give such a release as part of a judicially approved class settlement." Brief of Matsushita at 20.

This attempt to equate class settlements with the settlement of traditional litigation by individual parties falls short. Matsushita is correct, of course, that individual plaintiffs may release whatever claims they choose in settling traditional non-class litigation, whether or not related to the claims asserted in the pleadings. Because court approval of ordinary settlements is not required, the amount and form of consideration a party is willing to give or receive to settle a case is a matter of judicial indifference. Whether the forum court has jurisdiction over the claims a

party chooses to release in settling traditional litigation is irrelevant. *See Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383 (9th Cir. 1978) (an individual litigant who releases exclusively federal claims as part of a settlement of a state action may not relitigate them in federal court). Indeed, general releases are commonly exchanged between individual litigants in settlements.

However, the settlement of a class action is fundamentally different from the settlement of traditional litigation.[32] First, Matsushita is simply wrong to assert that a "class" may give a release as part of a settlement. A class is not an entity that has rights; the rights belong to the class members. But class members, unlike individual litigants in traditional lawsuits, are bound by the settlement even though they do not individually consent to its terms. Instead, consent is given by class representatives, who derive authority to represent members not by obtaining their consent, but by obtaining a court order designating them the representatives.

Second, class members may only give a release as part of a *judicially approved* settlement. Class representatives lack the "power to give a release of the class rights" on their own, *absent*

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[32] Furthermore, class actions are different from derivative actions, such as that at issue in *Abramson v. Penwood*, 392 F.2d 759 (2d Cir. 1968). Matsushita relies on *Abramson* as authority for the proposition that a class action settlement may release exclusively federal claims regardless of the limited subject matter jurisdiction of the forum court. However, *Abramson* was not a class action. Rather, it involved a shareholder derivative action that included the release of exclusively federal claims owned by the real party in interest, the corporation. This case is inapposite because of the essential difference between a shareholder derivative action and a class action. As Judge Friendly pointed out in a later case, there is a

> fundamental difference between derivative suits and class actions. The plaintiff in a derivative suit is suing on behalf of a corporation. In a derivative suit settlement ... the legal entity whose unpleaded claims are being released—*the corporation—is a party to the settlement.* The corporation has the power to release its claims whether asserted in the complaint or not. Although there are other considerations that require a court to scrutinize carefully the scope of the releases, the court may be confident that the parties have the power to make them.

National Super Spuds, 660 F.2d at 18-19 (emphasis added).

judicial approval of the release and entry of a judgment. *National Super Spuds*, 660 F.2d at 18 (quoting Haudek, *The Settlement and Dismissal of Stockholders' Action — Part II: The Settlement*, 23 Sw.L.J. 765, 773 (1969)). Because class actions do not require the active participation of class members, class settlements pose a danger not present in traditional litigation: that representative plaintiffs and their lawyers will "endeavor to obtain a better settlement by sacrificing the claims of others at no cost to themselves." *Id.* at 19. For this reason, "a court may not delegate to [class] counsel the performance of its [own] duty to protect the interests of absent class members." *Plummer v. Chemical Bank*, 668 F.2d 654, 659 n.4 (2d Cir. 1982). Instead, in order to protect the rights of absent class members, the court must assume a far more active role than it typically plays in traditional litigation. A class action, thus, is less an individual lawsuit than "a quasi-administrative proceeding, conducted by the judge." *Shutts v. Phillips Petroleum Co.*, 472 U.S. 797, 809 (1985).

This notwithstanding, Matsushita argues that the failure of the Epstein plaintiffs to opt out of the class is sufficient reason to bind them contractually to the release of their federal claims. In Matsushita's view, the opportunity to opt out changes the essence of a class action settlement from an exercise of judicial power restrained by jurisdictional limits into an exercise of individual consent. This argument fails for two reasons. First, that the class members have a right to opt out does not diminish the extent to which a class action settlement is an exercise of judicial power. Regardless of whether class members are given opt-out rights, the court is still required to ensure that representation is adequate and that the settlement is fair to class members. *See, e.g., Prezant v. Salton/Maxim Houseware, Inc.*, 636 A.2d 915 (Del. 1994). The settlement of the class action is not an act of judicial mediation; it is an act of judicial power. Second, the "consent" purportedly given by class members in deciding *not* to opt out is hardly comparable to the consent given by individual plaintiffs in deciding to settle their own traditional lawsuits. Because opt-out rights are, as the Delaware Supreme Court has observed, "infrequently utilized and usually economically impracticable," *Prezant*, 636 A.2d at 924, we would be blind to reality to think that

any consent implied by class members in deciding not to opt out is comparable to the consent given by individual plaintiffs in settling their own lawsuits.

In sum, we reject Matsushita's effort to equate class settlements with settlements of individual lawsuits. We believe that a state court cannot require passive class members to contractually release their exclusively federal claims in order to enjoy the benefits of a state class action, when the court has no jurisdictional power to dispose of those claims either directly or indirectly through the doctrine of issue preclusion.[33]

D. Conclusion

We respectfully decline to give full faith and credit to the Delaware judgment to the extent that it releases exclusively federal claims that depend upon different underlying facts than the state claims depend upon. [34] Accordingly, we hold that the Delaware judgment does not preclude the Epstein class action.

V. Class Certification

We now turn to the question whether the district court abused its discretion in denying the Epstein plaintiffs' motion for class certification. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1304 (9th Cir. 1990) (class certification rulings reviewed for abuse of discretion). The district court gave no explanation for its ruling.

This case fits the requirements of both Rule 23(a) and Rule 23(b)(3) like a glove. The questions of Matsushita's liability are

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[33] Whether the release of federal securities claims in this case is a valid contract defense to the Epstein class action is a question of federal law. *See, e.g., Newton v. Rumery*, 480 U.S. 386, 392 (1987). A contract releasing federal statutory rights need not be enforced by a federal court if "the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.*

[34] Again, we do not decide whether a state court may release exclusively federal claims in a class action settlement judgment when those claims depend on the same facts as state law claims before the court.

the same for each of the 7,000 shareholders who tendered their MCA shares: (1) Did Matsushita violate section 14d-10 in acquiring Wasserman's shares on terms that were different from the terms of the tender offer, and (2) Did Matsushita violate section 14d-10 in authorizing the post-tender offer payment of $21 million to Sheinberg? The claims of every tendering shareholder turn on identical facts and law—regardless of the identity or circumstances of the particular shareholder.

Under these circumstances, a class action would plainly be "superior to other available methods for the fair and efficient adjudication of the controversy," because the "interest of members of the class in individually controlling the prosecution ... of separate actions," is minimal, while the "desirability ... of concentrating the litigation of claims in the particular forum," is compelling. Fed.R.Civ.P. 23(b)(3). Indeed, it is difficult to imagine a case where class certification would be more appropriate. Without it, thousands of identical complaints by former MCA shareholders would have to be filed—the very result the class action mechanism was designed to avoid.

Matsushita argues nonetheless that the claims of each MCA shareholder do not have enough in common to justify class certification because an "indispensable element of each plaintiff's claim is that he or she would have elected to take the preferred stock [given to Wasserman] if it was offered." Brief of Matsushita at 52. Matsushita also argues that each individual shareholder's per share damages will vary because whether "the preferred stock" that Wasserman received "could have constituted 'higher' consideration" than the cash all other shareholders received "would depend on the individual [tax] circumstances of each plaintiff." *Id.* "Each plaintiff," it claims, "would be subject to cross examination on these issues." *Id.*

These arguments are meritless. In the first place, Matsushita cites neither law nor logic for the proposition that each shareholder is required to prove as an element of a Rule 14d-10 violation that she would have elected to take the preferred stock given to Wasserman had she been offered it. All a shareholder needs to prove to recover damages as a result of the Wasserman

transaction is that she was not offered the consideration provided to Wasserman, and that the consideration Wasserman received was worth more than the consideration she received. Since it is undisputed that each shareholder (save Wasserman and perhaps Sheinberg) received $66 in cash and $5 worth of stock in WWOR-TV, each shareholder's per share damages would be measured by the same yardstick: the extent to which the value of the preferred stock Wasserman received for each of his shares was greater than the $66 cash per share other shareholders received.[35] The tax situation of each shareholder has nothing to do with it. Furthermore, "the amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

In arguing against class certification, Matsushita mentions only the Wasserman transaction. It says nothing about why a class should not be certified to litigate the claim that Matsushita made the $21 million payment to Sheinberg. If plaintiffs prevail on their claim that Matsushita violated Rule 14d-10 by paying Sheinberg a premium of $21 million for his 1,179,635 shares, the damages of each tendering shareholder would simply be $17.80 per share.

Finally, Matsushita argues that the named plaintiffs are unsuitable to serve as class representatives, citing the district court's finding that plaintiff Lawrence Epstein prosecuted this action under "false pretenses" because he "deliberately concealed" from the court that he held his MCA stock in a tax-free IRA account. This finding, however, was first proposed by Matsushita in a motion filed well after the district court denied class certification, which means that it could not have informed in any way the district court's denial of the Epstein plaintiffs' motion. Moreover, we fail to see why the fact that Epstein held his shares in an IRA account should disqualify him from serving as a named plaintiff in this case. A shareholder's individual tax circumstances, as we have stated, has no relevance to whether

[35] Recall that Wasserman also received for each of his shares the $5 worth of stock in WWOR-TV.

Matsushita violated Rule 14d-10 or how much in damages it would owe tendering MCA shareholders if it did.[36]

The record shows that the performance of the Epstein plaintiffs and their counsel in pursuing this litigation has been exemplary. We see no reason why they should not represent the class of MCA shareholders who tendered their shares. The district court's order denying class certification is vacated, and the district court is instructed on remand to enter an order certifying the class.

VI. The Motion to Amend the Complaint

The Epstein plaintiffs argue that the district court abused its discretion in denying their motion to amend their complaint to allege that the tender offer documents released to shareholders were false and misleading, in violation of section 14(e) of the Williams Act.[37] The district court failed to explain why it denied the motion. "In the absence of some statement of reasons or findings of fact showing bad faith or prejudice, we cannot [on the record before us] determine whether it was an abuse of discretion to deny" the motion for leave to amend the complaint. *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981). Accordingly, we vacate the district court's order denying the motion for leave to amend and remand to the district court for reconsideration of the motion.

[36] In addition, the record lends no support to the notion that Epstein misbehaved in pursuing this litigation. The district court's finding that he prosecuted this action under false pretenses is clearly erroneous. There is no evidence that Epstein intentionally hid the fact that he kept his shares in an IRA account. Matsushita deposed Epstein twice, but failed to ask him how he held his MCA shares. Further, prior to his second deposition, Epstein produced transaction slips which indicated that he held his MCA shares in an IRA account.

[37] Plaintiff Walter Minton argues on appeal that the district court abused its discretion in denying his motion to amend his complaint to add a section 14(d)(7) claim. Because there is no material difference between a section 14(d)(7) and a Rule 14d-10 claim, the question whether the district court abused its discretion in denying Minton's motion for leave to amend is moot.

VII. Conclusion

1. The district court's order denying plaintiffs' motion for partial summary judgment against Matsushita on the Wasserman claim is reversed, and the district court is instructed to grant such motion.

2. The district court's order granting Matsushita's motion for summary judgment is vacated.

3. The district court's order dismissing plaintiffs' claims against MCA, Wasserman, and Sheinberg for aiding and abetting is affirmed.

4. The district court's orders denying the Epstein plaintiffs' motions for class certification and for leave to amend their complaint are vacated and remanded.

Appendix B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE EPSTEIN, et al., *Plaintiffs,* *v.* MCA INC., et al., *Defendants.*	CASE NO. CV 90-6451-R CASE NO. CV 91-0336 R (Consolidated Cases) SECOND AMENDED ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING MATSUSHITA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING THE CONSOLIDATED ACTIONS
WALTER MINTON, *Plaintiff,* *v.* MCA INC., et al., *Defendants.*	

The motion of defendants Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corp. and Matsushita Acquisition Corp. (the "Matsushita Defendants") for summary judgment dismissing the *Epstein* plaintiffs' Consolidated Amended Complaint and the complaint filed by plaintiff Walter Minton came on for hearing on Monday, February 10, 1992 at 10:00 a.m. in Courtroom 8 of the above-entitled Court before the Honorable Manuel L. Real.[38]

After full consideration of the evidence, the points and authorities and declarations submitted by the parties, and the

[38] This Second Amended Proposed Order and Findings of Fact and Conclusions of Law is filed by leave of this Court granted March 3, 1992, upon Matsushita's application to supplement the record to reflect the recently-discovered fact that the MCA stock owned by lead plaintiff Lawrence Epstein was held in a tax-free retirement account.

oral argument of counsel, and upon all prior proceedings held herein, including the Court's Order of August 13, 1991 dismissing all claims in this action brought under SEC Rule 10b-13, and all claims against defendants MCA Inc. ("MCA"), Lew R. Wasserman and Sidney J. Sheinberg, the Court finds that the Matsushita Defendants are entitled to summary judgment dismissing with prejudice the *Epstein* plaintiffs' Consolidated Amended Complaint and the complaint filed by plaintiff Minton as a matter of law.

I. UNCONTROVERTED FACTS

The Court finds that there is no genuine issue as to the following material facts:

1. Defendant Matsushita Holding Corp. is a Delaware corporation formed by Defendant Matsushita Electric Industrial Co., Ltd., a Japanese corporation, for the purpose of making a tender offer for the common stock of MCA. *See* Pre-Trial Conference Order, filed January 27, 1992, Stipulated Fact No. 2.

2. MCA is a Delaware corporation having its principal place of business in Los Angeles, California. *See* Stipulated Fact No. 3.

3. At all relevant times, Lew R. Wasserman has been the Chairman of the Board of Directors and Chief Executive Officer of MCA. As of November 26, 1990, Mr. Wasserman directly owned approximately 4,953,927 shares of MCA common stock. Mr. Wasserman's basis in that stock was approximately 3 cents per share. As of September 1990, Mr. Wasserman was 77 years of age. *See* Stipulated Fact No. 4.

4. Sidney J. Sheinberg is President and Chief Operating Officer of MCA. Immediately prior to the tender offer, Mr. Sheinberg owned approximately 1,179,635 shares of MCA common stock. *See* Stipulated Fact No. 5.

5. The several complaints filed by plaintiffs Lawrence Epstein, John Linder, Ruth Karlin, Maurice Karlin, Beth Ann

Karlin, Bert P. Karlin and Jane Rockford (the "*Epstein plaintiffs*"), the first of which was filed on December 3, 1990, were consolidated in a consolidated amended complaint dated April 22, 1991 (the "Epstein action"). The *Epstein* action was consolidated with the complaint filed by plaintiff Walter Minton on January 17, 1991, by Order of the Court dated April 23, 1991. Each of these complaints alleged identical claims under Securities and Exchange Commission ("SEC") Rule 10b-13 and Rule 14d-10(a)(2), and no other provision of law.

6. As a result of the Court's prior rulings denying class certification on April 1, 1991 and September 3, 1991, the *Epstein* plaintiffs maintain this action individually, in their own right only.

7. By Order dated August 13, 1991, the Court dismissed with prejudice plaintiffs' claims under SEC Rule 10b-13 on the ground that there is no implied private right of action under that provision, and dismissed with prejudice all claims asserted against MCA and Messrs. Wasserman and Sheinberg for failure to state a claim upon which relief can be granted.

8. On December 9, 1991, after full briefing and a hearing, the Court enjoined plaintiffs and their counsel from (1) commencing litigation arising out of the MCA acquisition against any entity and (2) amending the pleadings in any previously-filed actions relating to the MCA acquisition to add new parties without prior leave of this Court.

9. On January 13, 1992, the Court granted the motion of plaintiffs Maurice Karlin, Ruth Karlin, Beth Ann Karlin and Bert Karlin (the "Karlins") for voluntary dismissal with prejudice from this action. The Court did not dismiss the Karlins from Matsushita's then pending motion for contempt and sanctions for the *Epstein* plaintiffs' failure to comply with the Court's November 4, 1991 order compelling discovery.

10. On January 27, 1992, after full briefing and a hearing, the Court found each of the *Epstein* plaintiffs and their counsel, Roger Kirby of Kaufman, Malchman, Kaufmann & Kirby, in

contempt of Court for their continued failure to provide Matsushita with all discovery ordered to be produced in the Court's Order of November 4, 1991, and awarded sanctions to Matsushita, in an amount yet to be calculated.

11. On March 3, 1992, upon Matsushita's application to supplement the record, the Court found that lead plaintiff and purported class representative Lawrence Epstein prosecuted this action for 15 months under false pretenses. Throughout this litigation, the *Epstein* plaintiffs deliberately concealed the fact that the MCA stock owned by Mr. Epstein was held in a tax-free IRA account. In depositions, Mr. Epstein testified under oath that he initiated this action because Mr. Wasserman was disposing of his MCA stock in a "tax free" transaction and Mr. Epstein was not. Mr. Epstein also testified that he anticipated paying capital gains taxes as a result of his profit on the tender of his MCA stock. In fact, Mr. Esptein knew he would not pay capital gains tax as a result of Matsushita's Tender Offer for MCA because his MCA stock, and his Tender Offer proceeds, were held in a tax-free retirement account. *See* Prudential-Bache Retirement Account Statements, attached as Exhibit C to Declaration of Barry R. Ostrager, sworn to on February 27, 1992, and filed in support of Matsushita Defendants' *Ex Parte* Application to Supplement the Record. This fact demonstrates that Mr. Epstein did not and could not have sustained any injury as a result of the Tender Offer, and, if known, would have disqualified him as a plaintiff in this action.

A. The Contribution Agreement

12. For business reasons, it was important to Matsushita to maintain continuity in the management of MCA if Matsushita acquired MCA in the Tender Offer.

13. Prior to 9:30 a.m. on November 26, 1990, Matsushita and MCA entered into an Agreement and Plan of Merger (the "Merger Agreement"), which provided that Matsushita would make a cash tender offer for the outstanding shares of MCA (the "Tender Offer") and that thereafter Matsushita Acquisition Corp. would merge with and into MCA.

14. Prior to 9:30 a.m. on November 26, 1990, Matsushita and Lew R. Wasserman entered into the Capital Contribution and Loan Agreement ("Contribution Agreement"), whereby Mr. Wasserman committed to exchange his MCA common stock for preferred stock in Matsushita Holding Corp. after the expiration of the Tender Offer, in a capital contribution transaction involving the issuance of shares in a new parent company of MCA, a transaction that was different from the Tender Offer in form and purpose. *See* Stipulated Fact No. 17.

15. Subsequently, at 9:42 a.m., e.s.t. on November 26, 1990, the Tender Offer was publicly announced. See Declaration of Gerald Sauer, sworn to on October 14, 1991, Exhibit C.

16. SEC Rule 14d-10 regulates certain conduct by a tender offeror during the tender offer period. *See* 17 C.F.R. § 240.14d-10 (1991). The tender offer period expires when shares may no longer be tendered for acceptance pursuant to the tender offer. *See, e.g.*, 17 C.F.R. § 240.10b-13 (1991).

17. Pursuant to the terms of the Offer to Purchase, the Tender Offer expired—that is, shares could no longer be tendered for acceptance pursuant to the Tender Offer—at 12:01 a.m. on December 29, 1990. *See* Offer to Purchase, at cover page, p.5; Complaint, ¶ 32.

18. The Offer to Purchase bound Matsushita to accept the tendered shares for payment if more than 50 percent of the outstanding shares of MCA were validly tendered. *See* Offer to Purchase, at 1.

19. Immediately after 12:01 a.m. on December 29, 1990, attorneys for Matsushita telephoned the depositary for the Tender Offer (Citibank, N.A.), to ascertain whether more than 50 percent of the shares had been validly tendered. *See* Stipulated Fact No. 19.

20. The depositary informed Matsushita that ninety-one percent of all MCA shares had been tendered and not withdrawn by that time. *See* Stipulated Fact No. 19; Declaration of John G. Finley, dated February 25, 1991 ("Finley Decl."), attached as

Exhibit C to the Declaration of Gerald Sauer, dated January 17, 1992, filed in support of Matsushita's motion for summary judgment ("Sauer Decl."). At this point shares could no longer be tendered for acceptance, and the Tender Offer period expired.

21. At 12:05 a.m. on December 29, 1990, Matsushita accepted the tendered shares for payment by telecopying a notice of acceptance for payment to the depositary. *See* Stipulated Fact No. 21; Notice of Acceptance, attached as Exhibit D to the Sauer Decl.

22. The Contribution Agreement was consummated at 1:25 a.m. on December 29, 1990, when Mr. Wasserman exchanged his MCA common stock certificates for preferred stock certificates in Matsushita Holding Corp. *See* Stipulated Fact No. 21; Cross Receipt, attached as Exhibit E to the Sauer Decl.; Finley Decl., ¶ 3.

23. The value of the preferred stock received by Mr. Wasserman in exchange for his MCA common stock was no greater than the $66 in cash paid pursuant to the Tender Offer. At best the basis of the Wasserman MCA stock would be transferred to the stock of Matsushita received by Wasserman under § 368(a)(1)(b) of the Internal Revenue Code.

24. Plaintiffs Epstein, Linder and Rockford have represented to the Court that they would not have elected to receive the preferred stock in lieu of $66 in cash, even if Matsushita had offered preferred stock as an alternative form of consideration in the Tender Offer. *See* Transcript of hearing dated December 16, 1991 at 10; Plaintiffs' Supplemental Memorandum in Opposition to Matsushita's Motion to Compel dated October 29, 1991 at 2.

25. Plaintiff Epstein received the cash Tender offer proceeds tax-free and was able to invest them as he chose.

B. The Sheinberg Employment Contract

26. Under Mr. Sheinberg's employment agreement with MCA prior to the Tender Offer, Mr. Sheinberg had the right to terminate his employment whenever MCA was acquired by any

entity, and to continue for the remaining years of his employment contract to receive his salary of $8 million per year.

27. On December 31, 1990, MCA paid Mr. Sheinberg $21 million in consideration for his Amended Employment Agreement, (the "Sheinberg Employment Contract") whereby he agreed to continue his employment with MCA for a set term and to relinquish certain rights under his prior employment contract, including his right to collect salary without performing future services. *See* Sheinberg Employment Contract, attached as Exhibit F to the Sauer Decl.; Stipulated Fact No. 18; Declaration of Theodore N. Mirvis, dated October 11, 1991 ("Mirvis Decl.") and attached as Exhibit G to the Sauer Decl.

28. The $21 million payment was also made to compensate Mr. Sheinberg for the loss of a stock option bonus for 1 million shares of MCA promised to him by MCA prior to the Tender Offer, and which he would have received but for the Tender Offer. *See* Offer to Purchase, at 25-26; Deposition of Lew Wasserman dated June 12, 1991, at 75.

29. The $21 million payment was made by MCA, not Matsushita. *See* Pretrial Order Stipulated Fact No. 18; Mirvis Decl. ¶ 2, attached as Exhibit G to the Sauer Decl.

30. On January 3, 1991, MCA shareholders who had tendered their shares into the Tender Offer were paid $66 in cash per share, plus a stock representing an interest in WWOR-TV, which MCA spun off to its shareholders. A short-form merger was also completed on January 3, 1991.

II. CONCLUSIONS OF LAW

31. By order dated August 13, 1991, the Court dismissed with prejudice all claims brought under SEC Rule 10b-13 on the ground that no private right of action exists under that provision. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530 (9th Cir. 1984). The Court also dismissed in that Order all claims alleged against defendants MCA and Messrs. Wasserman and Sheinberg for failure to state a claim upon which relief can be granted.

A. AS A MATTER OF LAW, THE CAPITAL CONTRIBUTION AGREEMENT DID NOT VIOLATE RULE 14D-10

32. Rule 14d-10 is a mechanical provision regulating certain payments to shareholders of a target corporation *during* the tender offer period. *See* 17 C.F.R. 240.14d-10 (1986).[52] By its own terms, Rule 14d-10 proscribes only payments made to shareholders during the tender offer period. Rule 14d-10 does not purport to regulate payments to shareholders either prior to the commencement of the tender offer period or after the tender offer period expires.

33. The SEC itself and all relevant case law make clear that the tender offer rules do not apply to private transactions before or after the tender offer period. See SEC Exchange Act Release No. 8712 [1969-70 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,745, at 83,709 (Oct. 8, 1969); *see also Priddy v. Edelman*, 679 F. Supp. 1425, 1432 (E.D. Mich. 1988), *aff'd*, 883 F.2d 438 (6th Cir. 1989); *Brill v. Burlington Northern, Inc.*, 590 F. Supp. 893, 900 n.12 (D. Del. 1984).

34. Injury and damages are essential elements of plaintiffs' claims. The sole theory of injury or damages advanced by plaintiffs was a demand for an additional cash payment equal to the tax Mr. Wasserman would have paid if he had received $66 in cash for his MCA shares rather than continuing as a shareholder in the new parent company of MCA. This theory cannot support a finding of injury or damages.

35. Mr. Wasserman and each of the plaintiffs has his or her own unique tax situation and the transactions at issue had unique tax consequences for each MCA shareholder. For example, plaintiff Epstein's shares are held in a tax-free Individual Retirement account. Wasserman's tax-basis would be transferred pursuant to § 368(A)(1)(b) of the Internal Revenue Code.

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[52] Rule 14d-10 provides, in relevant part, as follows: "(a) No bidder shall make a tender offer unless . . . (2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder *during such tender offer*." 17 C.F.R. 240.14d-10 (1991) (emphasis added).

36. Therefore, plaintiffs cannot prove a violation of Rule 14d-10 without establishing each of the following insupportable propositions: (a) that Mr. Wasserman was paid *during* the tender offer period; (b) assuming Mr. Wasserman was paid during the tender offer period, that he received *higher* consideration than the other MCA shareholders received pursuant to the Tender Offer; and (c) assuming the above two elements are established, that plaintiffs were damaged by not having the option to receive the preferred stock. *See Priddy*, 679 F. Supp. at 1431-32; *see also Kahn v. Virginia Retirement System*, F. Supp. , 1992 WL 8939 (E.D. Va. Jan. 23, 1992). Plaintiffs have established none of these requirements.[53]

1. The Capital Contribution Agreement Was Entered Into Before the Tender Offer Commenced

37. For the purposes of Rule 14d-10, the commencement of the tender offer period is defined by Rule 14d-2. Rule 14d-2 provides that the initial public announcement shall be "deemed" to be the commencement of the tender offer unless, *within five business days of such an announcement*, the bidder publishes the disclosures required by Rule 14d-6 and Rule 14d-4, namely the Schedule 14D-1. See Rule 14d-2(b)(2). If the bidder publishes and files its Schedule 14D-1 in accordance with Rules 14d-6 and 14d-4, then the date of commencement of the tender offer is the date of the filing of the Schedule 14D-1 (not the date of the initial public announcement). *See* Rule 14d-2(b)(i).

38. The parties have stipulated that Matsushita published and filed its Schedule 14D-1 on November 30, 1990. Pretrial order, dated January 21, 1992, Stipulated Fact No. 16. Accordingly, under Rule 14d-10, November 30 is the date of the commencement of the Tender Offer period.

39. As the Contribution Agreement was entered into on November 26th, the Contribution Agreement was entered into

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[53] In addition to the foregoing, to establish a violation of Rule 14d-10, plaintiffs must demonstrate that the Matsushita defendants acted with scienter. *Cf. Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 539 (9th Cir. 1984). Plaintiffs proffered no evidence touching this element of their case.

prior to the November 30 commencement of the Tender Offer period.

2. *The Capital Contribution Agreement Was Consummated After The Tender Offer Period Expired*

40. For the purposes of the Williams Act and the SEC Rules promulgated thereunder, the tender offer period expires when shares may no longer be tendered for acceptance pursuant to the tender offer. *See, e.g.*, 17 C.F.R. § 240.10b-13 (1991) (tender offer rules are inoperative after expiration of the period when "securities tendered pursuant to such offer may by the terms of the offer be accepted or rejected"); *Kahn v. Virginia Retirement System,* F. Supp. , 1992 WL 8939 (E.D. Va. Jan. 23, 1992) (no violation of Rule 14d-10 where the challenged transactions were contracted for prior to the commencement of the tender offer period and consummated after the acceptance for payment of tendered shares); *Kramer v. Time-Warner, Inc.*, [1990-91 Transfer Binder] (CCH) ¶ 95,619, at 97,902 (S.D.N.Y. 1990), *aff'd*, 937 F.2d 767 (2d Cir. 1991) (equivalent tender offer period for Rules 10b-13 and 14d-10).[54]

41. A time-stamped cross-receipt proves (and plaintiffs offered no evidence to contradict the fact) that the Contribution Agreement was consummated at 1:25 a.m., on December 29, 1990 when Mr. Wasserman exchanged his MCA stock for preferred stock in Matsushita Holding Corp. *See* Cross Receipt, attached as Exhibit E to the accompanying Sauer Decl.; Finley Decl., at ¶ 3. As a matter of law, this payment was made after the Tender Offer expired.[55]

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[54] Throughout this litigation plaintiffs have relied upon a single case, *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), which plaintiffs misread. Among other differences, the violative payment in *Field* was arguably made during the tender offer period. Field, 850 F.2d at 942-43.

[55] As provided by the Contribution Agreement, the consummation of the Wasserman transaction could only occur following "the time at which shares of MCA Common Stock are accepted for payment pursuant to and in accordance with the terms of the Offer." *See* Stipulated Fact No. 8; Contribution Agreement, § 2(a) (emphasis added).

42. These facts conclusively establish that the contribution Agreement did not violate Rule 14d-10.

43. No case has ever held that a tender offer extends past the last date upon which shares can be tendered in order to encompass a private transaction that was consummated thereafter. Instead, case law unanimously concludes that the tender offer Rules do not preclude private sales of stock so long as the technical terms of the Rules are obeyed. *See, e.g., Hanson Trust PLC v. SCM Corp.*, 774 F. 2d 47, 60 (2d Cir. 1985) (if tender offer not currently pending, "neither the [Williams] Act nor any SEC Rule promulgated thereunder prohibits" the purchase of "stock of a target company through privately negotiated transactions"); *Kramer*, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,619, at 97,902 (no Rule 14d-10 violation when compensation agreement entered into on same day as tender offer announced and consummated after the close of the tender offer period); *Priddy*, 679 F. Supp. at 1432 (when major shareholder bought out at higher price after original tender offer withdrawn and before successive tender offer commenced, such purchase not made "during or pursuant to any tender offer whatsoever"; if tender offer not pending, offeror may "purchase shares upon whatever other terms may be negotiated, free of the constraints of [Rule 14d-10]"); *Brill*, 590 F. Supp. at 900 n.12 (pre-tender offer purchases should not be integrated with purchases made pursuant to tender offer) (collecting cases).

44. Indeed, extension of the tender offer Rules to privately negotiated purchases consummated outside the tender offer period "would likely have a disruptive effect upon private . . . transactions which was never intended [by Congress]." *Nachman Corp. v. Halfred, Inc.*, [1973-74 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,455, at 95,593 (N.D. Ill. 1973).

3. *The Merger Agreement and Contribution Agreement are Separate Agreements Entailing Independent Obligations Owed to Different Parties*

45. Plaintiffs have argued (with no evidentiary support) that the Contribution Agreement was somehow made "pursuant to" the Tender Offer or that it is "intertwined" with the Tender

Offer.[56] For all purposes relevant to Rule 14d-10, the Contribution Agreement and Merger Agreement are separate and independent.

46. It is clear from the operative terms of the two Agreements that they each create independently enforceable obligations. Matsushita was legally obligated to consummate the Tender Offer without regard for the Contribution Agreement. *See* Offer to Purchase, § 2, p. 6; *see also Lowenschuss v. Kane*, 520 F.2d 255 (2d Cir. 1975). Under the Merger Agreement, as long as more than 50 percent of the outstanding shares were tendered and the other conditions of the Tender Offer (none of which related to Mr. Wasserman) were satisfied, Matsushita was fully obligated to pay for all shares tendered regardless of whether Mr. Wasserman's shares were purchased pursuant to the Contribution Agreement. *See* Merger Agreement, at Article 8; Declaration of Kaoru Takada, dated December 26, 1990 and filed with the Court on December 27, 1990, at ¶¶ 3-7.

47. Moreover, the Contribution Agreement became binding on Mr. Wasserman *before* the Tender Offer was announced. Matsushita in fact conditioned the making of the Tender Offer on Mr. Wasserman's separately negotiated, prior commitment set forth in the Contribution Agreement to exchange his MCA shares for shares in Matsushita Holding Corp. after the expiration of the Tender Offer. *See* Declaration of Lew R. Wasserman dated December 26, 1990. Thus, Mr. Wasserman alone relinquished the right of every other MCA shareholder to sell into the market during the Tender Offer period.

[56] These arguments are irrelevant in any event. Under Rule 14d-10, unless the separate transaction in question occurs *during the tender offer period*, the Rule does not regulate it. *See Kahn, supra*. Therefore, the fact that a transaction may be related to a tender offer in certain respects is immaterial to the operation of Rule 14d-10 if the separate transaction is neither entered into nor consummated during the Tender Offer period. *See* 17 C.F.R. § 240.14d-10.

4. No Case Law Supports Plaintiffs' Position that the Capital Contribution Agreement and the Tender Offer Should be Integrated

48. Plaintiffs invite the Court to ignore the language of Rule 14d-10 and the realities of the transactions at issue to fuse two separate transactions into a single tender offer transaction. Plaintiffs' argument is entirely inconsistent with relevant case law. Throughout this litigation plaintiffs have relied upon a single case, which (as this Court has observed) plaintiffs misread. In *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), the Second Circuit held that there was a material issue of fact precluding a motion to dismiss on the issue of whether two public tender offers should be integrated as one when the offeror "withdrew" the initial public tender offer for a period of a few hours to consummate a private transaction at a higher price and then commenced a purported "second" tender offer. These facts are clearly distinguishable from this case and concern an issue that does not exist here.

49. Plaintiffs misapply *Field* to argue that the Court should expand the scope of a *single* uninterrupted public tender offer to integrate a private transaction that was entered into and consummated outside the public tender offer period. *Field* does not support the integration of private transactions that precede or follow a public tender offer, and it has never been so construed. *See, e.g., Kramer v. Time Warner*, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,619 (S.D.N.Y. Oct. 24, 1990) (finding *Field* "easily distinguishable") *aff'd*, 937 F.2d 767 (2d Cir. 1991). The tender offer Rules are technical prohibitions which must be strictly interpreted "for the accurate guidance of those engaged in the complexity of negotiations for corporate control." *See Feder v. MacFadden Holdings, Inc.*, 722 F. Supp. 68, 70 (S.D.N.Y. 1989).[57]

[57] Courts have consistently recognized that parties attempting to structure transactions in compliance with the federal securities laws need guidance and certainty. *See, e.g., Pinter v. Dahl*, 486 U.S. 622, 652 (1988); *City Capital Assoc. Ltd. Partnership v. Interco, Inc.*, 860 F.2d 60, 64 (3d Cir. 1988) (federal securities laws, and Williams Act in particular, are "an area of the law in which predictability is of crucial importance"). Similarly, the

50. Rule 14d-10 applies only to "actions taken during tender offers," and is inapplicable to payments (like the payment under the Contribution Agreement here) made after the expiration of the Tender Offer period. *Kramer v. Time Warner, supra*, ¶ 95,619 at 97,902-903. In *Kramer*, the Court held that no violation of Rule 14d-10 occurred when a compensation agreement, entered into on the same day as the tender offer was announced, permitted management to receive a higher price per share after the tender offer period. The *Kramer* court found that "[t]his is simply not a case, like *Field*, in which a defendant has attempted artificially to bifurcate a single transaction in order to evade the tender offer rules." *Id.* at 97,903; *see also Feder*, 722 F. Supp. at 69 (court refuses to integrate two separate tender offers and a private purchase, limiting the application of *Field* to purported withdrawals of tender offers). There is no case to the contrary.

5. Plaintiffs Sustained No Damages

51. Mr. Wasserman did not receive a tax-free deal as plaintiffs contend. Rather, by operation of the Internal Revenue Code, Mr. Wasserman's tax basis in his MCA common stock was transferred to the preferred stock in Matsushita Holding Corp. he received under the Contribution Agreement, in a transaction in which no gain or loss was recognized. Mr. Wasserman received only a transfer of tax basis and not any tax benefit. Mr. Wasserman will pay tax on the preferred stock when it is redeemed.

52. None of the plaintiffs has sustained any legally-cognizable injury by virtue of not being offered the preferred stock. For

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Ninth Circuit rejected a definition of tender offer under Rule 13e-4 and 13e-1 that was "vague and difficult to apply" and "offer[ed] little guidance to the issuer as to when his conduct will come within the ambit" of the relevant rules. *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 953 (9th Cir. 1985). Plaintiffs' approach is "largely subjective and made in hindsight based on an *ex post facto* evaluation" of the facts of a particular case and therefore must be rejected. *Id.* As the Supreme Court and other federal courts have done, this Court rejects plaintiffs' invitation to "inject uncertainty into the tender offer process." *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985).

example, plaintiff Epstein received the *cash* Tender Offer proceeds tax-free, and was able to invest those proceeds as he chose. In addition, the *Epstein* plaintiffs stipulated that they would not have elected to receive the preferred stock received by Mr. Wasserman. Thus, Matsushita is entitled to summary judgment since plaintiffs cannot prove damages, an essential element of their claim.

B. THE SHEINBERG EMPLOYMENT CONTRACT DID NOT VIOLATE RULE 14D-10

53. Uncontested documentary evidence establishes that the $21 million Employment Contract payment was made to Mr. Sheinberg on December 31, 1990, two days after the expiration of the Tender Offer period. *See* Stipulated Fact No. 18; Mirvis Decl., ¶ 2. The signed and dated checks by which Mr. Sheinberg was paid were produced to plaintiffs on June 19, 1991.

54. Mr. Sheinberg's Employment Contract payment was made by MCA, not Matsushita. It is well settled that payments made by the target, as opposed to the bidder cannot constitute a Rule 14d-10 violation. *See* Kramer 937 F.2d at 779; *Brill* 590 F. Supp. at 900.

55. Moreover it is well settled that employment related payments are separate and distinct from tender offer payments. *See Brill*, 590 F. Supp. at 900-901.

III. CONCLUSION

56. Because plaintiffs have not and cannot "set forth specific facts showing that there is a genuine issue for trial," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), summary judgment is appropriate for defendants on all claims asserted under Rule 14d-10. The Court has previously dismissed with prejudice plaintiffs' claims under Rule 10b-13 and all claims asserted against MCA and Messrs. Wasserman and Sheinberg. Therefore, the Court shall enter final judgment dismissing both complaints with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion for summary judgment dismissing the *Epstein* plaintiffs' Consolidated Amended Complaint and the complaint filed by plaintiff Walter Minton is hereby granted with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the Order of this Court dated December 9, 1991, the above-mentioned plaintiffs and their respective counsel, and all persons in active concert or participation with any or all of them, and all persons having actual notice hereof, are hereby permanently restrained from commencing any judicial or administrative proceeding in any forum involving, or that would involve, directly or indirectly, by way of claims, defenses or counterclaims, any claims that arise out of the same transactions or occurrences as the claims in these actions, between these parties and from amending the pleadings to add new parties in any pending action between these parties arising out of Matsushita's acquisition of MCA, without first seeking and obtaining leave of this Court upon proper notice to the Matsushita defendants through their counsel in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction over these actions: (a) to enforce the above-described permanent injunction; (b) to enforce the order of January 27, 1992 finding the *Epstein* plaintiffs and their counsel in contempt of Court and to award costs and attorneys' fees and sanctions to Matsushita by reason

of the *Epstein* plaintiffs' contempt and (c) to award Matsushita its costs in this action as provided by Local Rule 16.

Dated: April 15, 1992

/s/ HON. MANUEL L. REAL
HON. MANUEL L. REAL
Chief Judge of the United
States District Court

Submitted by:

SIMPSON THACHER & BARTLETT
(a partnership which includes
professional corporations)

By: /s/ MARY KAY VYSKOCIL
Mary Kay Vyskocil

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER MINTON,

Plaintiff—Appellant,

v.

MCA INC., MATSUSHITA ACQUISITION CORPORATION, MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORPORATION, LEW WASSERMAN, SIDNEY J. SHEINBERG,

Defendants—Appellees

No. 92-55632

ORDER

LAWRENCE EPSTEIN, JOHN LINDER; JANE ROCKFORD, as trustee of the Michael J. Rockford Trust; MAURICE KARLIN; RUTH KARLIN; BETH ANN KARLIN; BERT P. KARLIN,

Plaintiffs—Appellants,

v.

MCA INC.; MATSUSHITA ACQUISITION CORPORATION; MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; MATSUSHITA HOLDING CORPORATION; LEW WASSERMAN; SIDNEY J. SHEINBERG,

Defendants—Appellees.

No. 92-55675

Before: NORRIS, WIGGINS, O'SCANNLAIN, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Wiggins and O'Scannlain have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

File stamped April 6, 1995 by Cathy A. Catterson, Clerk, U.S. Court of Appeals.

Appendix D

In RE MCA, INC. SHAREHOLDERS LITIGATION.

CIV. A. 11740.

Court of Chancery of Delaware.

Feb. 16, 1993.

MEMORANDUM OPINION

HARTNETT

After considering all the circumstances, the Court in its business judgment approves the settlement of this class action. That has the effect of barring related federal securities law claims that have been filed in federal district court in California. The settlement is approved because the Court finds, on balance, that it is in the best interests of the class to settle this litigation and the terms of the settlement are fair and reasonable—although the value of the benefit to the class is meager.

This decision also awards attorneys' fees to the attorneys for plaintiffs in an amount less than that sought.

I

This is the second time a proposed settlement of this class action has come before this Court. The facts appear in greater detail in this Court's previous opinion in which the initial proposed settlement was rejected. *See, In re MCA, Inc. Shareholders Litigation,* Del. Ch., 598 A.2d 687 (1991).

In September of 1990, Matsushita Electrical Industrial Co., Ltd. ("Matsushita") and MCA, Inc. publicly announced that they were negotiating a possible acquisition of MCA by Matsushita. During the next two days, three purported class action suits were filed against MCA and its directors. Notwithstanding that no acquisition agreement had been reached, the complaints alleged that the defendants had breached their fiduciary duty to

the shareholders by failing to implement a market check procedure to ensure that maximum shareholder value was realized. These actions were consolidated by an order of this Court dated October 2, 1990.

On November 26, 1990, MCA and Matsushita announced that they had entered into a Merger Agreement. Under the Merger Agreement, Matsushita agreed to make a cash tender offer for all of MCA's outstanding shares at $66 per share and agreed to spin off Pinelands, an MCA subsidiary, which controlled a television station which Matsushita, under federal law, was forbidden to acquire.

On December 3, 1990, a purported class action was filed in the United States District Court for the Central District of California as *Epstein v. MCA, Inc. et al.*, No. CV-90-6451-R ("the Epstein action"). The Epstein action alleged that the tender offer included a special deal for the acquisition of the approximately 5 million shares of MCA held by Lew R. Wasserman, MCA's chairman and CEO. Wasserman had agreed with Matsushita to exchange his shares for a special class of preferred stock in a Matsushita subsidiary.

The complaint in the *Epstein* action alleged that this transaction violated SEC Rule l0b-13, 17 C.F.R. 240.10b-13, that prohibits purchases by a tender offeror outside a tender offer during the pendency of the offer and also violated the "all holders, best price" rule in SEC Rule 14d-10, 17 C.F.R. 240.14d-10. Four additional purported class actions alleging similar claims were also filed in the California Federal District Court and were consolidated by Order of the District Court on April 1, 1991.

The plaintiffs in this Delaware action amended their complaint on December 14, 1990 to allege that the tender offer materials failed to disclose the preferential treatment allegedly given to Wasserman. The amended complaint also named Matsushita as a defendant since it allegedly aided and abetted MCA in a breach of fiduciary duty by entering into the transaction with Wasserman. The amended complaint did not allege the breaches of federal securities laws asserted in *Epstein* action, however,

because such claims are within the exclusive jurisdiction of the federal courts.

On December 18, 1990, the parties in this Delaware action filed a Stipulation and Agreement of Compromise and Settlement and this Court provisionally certified the Class pursuant to Chancery Rule 23(b)(2) for settlement purposes only. David and Andrew Minton (purported shareholders of MCA) entered an appearance and objected to the proposed settlement on the sole basis that the settlement, if approved, would release the claims asserted in the Epstein action without affording the members of the class the opportunity to opt out of the class and continue to press the claims in the Epstein action.

This Court held that while the proposed settlement need not provide for an opt-out, it could not be approved. This Court found that the claims asserted in this Delaware action were "at best, extremely weak, and therefore, ha[d] little or no value. It further found that the federal securities law claims in the California action raised issues that had not been definitively addressed by the courts and that those claims therefore clearly had arguable merit and, therefore, some value. *MCA*, 598 A.2d at 695. This Court observed that it must carefully scrutinize any settlement that would have the effect of barring claims of at least arguable merit that were not raised in Delaware litigations but were asserted elsewhere, particularly if a proposed settlement was of little or no value to the class. *Id.*, (citing *Selfe v. Joseph*, Del. Supr., 501 A.2d 409 (1985)).

After this Court evaluated the proposed settlement under this standard, the settlement was rejected as being unfair to the class. *Id.* at 696. While the proposed settlement provided for a generous payment of up to $1 million in attorneys' fees, the only benefit proposed to be received by the class would have been a cosmetic change in a poison pill in Pinelands, a subsidiary of MCA. *Id.* at 695-96. In exchange for this "illusionary" benefit, the class would surrender any potential benefits from the claims in the Epstein action which this Court found to be "the only claims which have any substantial merit ...". *Id.* at 696. Therefore, the proposed settlement was rejected.

On April 1, 1991, the California Federal District Court rejected the plaintiffs' motion for class certification in the *Epstein* action and a second motion for class certification was rejected on September 3, 1991. By Order dated August 13, 1991 the same court dismissed the SEC Rule 10b-13 claim, on the basis that there is no private right of action under that provision. Finally, on February 10, 1992, the Federal District Court granted summary judgment to defendants on the SEC Rule 14d-10 claims on the basis that the Wasserman transaction did not take place within the tender offer period and that Wasserman did not receive a greater consideration than other shareholders. The Epstein plaintiffs have appealed these decisions to the United States Court of Appeals for the Ninth Circuit. On December 17, 1992, that court denied the request of the Epstein plaintiffs to expedite their appeal because of the pendency of the settlement in this Court.

The parties in this Delaware action have now submitted a second settlement proposal. If this proposed settlement is approved, the class will receive $2,000,000 in cash less any award of attorneys' fees. Any class member dissatisfied with the settlement may opt out of the class. This settlement, like the previous proposed settlement, is a "global settlement;" that is, it would bar not just the claims asserted in this Delaware action, but all related claims such as those asserted in the *Epstein* action.

At the settlement hearing, counsel for the plaintiffs in this Delaware action reported that 18 class members had opted out of the class. In addition, objections to the proposed settlement were received from three class members.

Pamela Minton de Ruiz, daughter of one of the Epstein plaintiffs, objected on the basis that the settlement is collusive. She argues, without any direct evidence of collusion, that the Delaware plaintiffs have colluded with the defendants to settle this action and dispose of the supposedly meritorious federal claims in exchange for an award of attorneys' fees and a de minimis benefit to the class. She argues that the opt out is virtually meaningless because, as a practical matter, "few shareholders will avail themselves of it". She makes this argument

despite that her brothers, David and Andrew Minton, as objectors to the first proposed settlement, strongly argued in favor of the same opt-out provision.

Objector William A. Krupman makes arguments similar to those made by Pamela Minton. Objector Marion Minton, wife of one of the Epstein plaintiffs, also objects to the adequacy of the notice of the settlement given to members of the class because Dean Witter apparently delayed transmitting the notice of the settlement hearing to the owners of shares held in street name by Dean Witter.

II

Chancery Rule 23(e) requires that the Court review proposed settlements of class action suits. The rule is "intended to guard against surreptitious buyouts of representative plaintiffs, leaving other class members without recourse." *Wied v. Valhi, Inc.*, Del.Supr., 466 A.2d 9, 15 (1983), *cert. denied*, 465 U.S. 1026 (1984). This Court must be particularly careful in reviewing a proposed settlement that has the effect of barring claims of at least arguable merit that are not asserted in Delaware but are being asserted in another forum. MCA, 598 A.2d at 695; see also, John C. Coffee, Jr., "Suspect Settlements In Securities Litigation" N.Y.L.J., March 28, 1991, p. 5. This Court's role in reviewing a proposed settlement is to exercise its discretion and to "apply its own business judgment in deciding whether the settlement is reasonable ... ". *Polk v. Good*, Del.Supr., 507 A.2d 531, 535 (1986). The factors to be considered in making this determination include: (1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectability of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectability of a judgment, and (6) the views of the parties involved, pro and con. *Id.* at 536 (citations omitted).

Particular attention must be paid to balancing the value of all the claims being compromised against the value of the benefit to be conferred on the class. *MCA*, 598 A.2d at 691. After

weighing the factors present here, the Court concludes that this settlement, notwithstanding that it has meager value to the class, should be approved as being in the best interests of the class.

As noted in the previous opinion in this case, the claims brought in this Delaware action were "extremely weak and, therefore, have little or no value." *Id.* at 694. At that time, the federal claims had not been litigated and raised issues which had not been "definitively addressed by the courts." *Id.* at 695. This Court therefore was reluctant to approve the settlement that would compromise those claims, despite their somewhat limited merit, particularly when the benefit to be received in exchange was of "illusionary" value to the class. *Id.* at 696.

Now, however, there has been a full hearing on the federal claims and those claims have been rejected on both legal and factual grounds in the U.S. District Court. The Objectors claim that these rulings are erroneous and that there is at least a chance that they will be reversed in a pending appeal. These federal claims, however, obviously now have less economic value than they had before their dismissal.

In determining whether a settlement should be approved, a court should not try the merits of the underlying claims. *MCA*, 598 A.2d at 691. This principle would seem to be especially appropriate where the underlying claims, like the federal claims here, are outside the jurisdiction of this Court.

It is sufficient that the determination of the federal district court that the claims lack merit must be accorded substantial weight in determining the present settlement value of those claims.

In exchange for surrendering the weak claims asserted in this Delaware action and the federal claims which, in light of the adverse federal district court decision, now have greatly diminished settlement value, the class will receive a $2 million cash settlement (less any award of attorneys' fees). As the objectors point out, this amounts to only two to three cents per share. While not a munificent recovery, on balance, the Court finds in its business judgment that it is adequate (if only barely so) to support the proposed settlement. This conclusion is based on the

Court's conclusion that the claims on appeal from the federal district court now have minimal economic value and that there is a provision to optout of the settlement although only eighteen requests for optouts were received from the more than 25,000 shareholders notified. The availability of the right to opt-out of the class protects the ability of class members who find the proposed settlement inadequate to continue the district court litigation.

The three objectors assert, without citing any empirical evidence, that because, as a practical matter, few small shareholders will ever opt-out of a settlement, the proposed settlement will in effect destroy the *Epstein* action as a class action. This argument comes from an unexpected source because the Mintons (two of the three objectors to this settlement) objected to the first proposed settlement solely on the grounds that it did not incorporate an opt-out provision. In any case, this Court's role is to evaluate the economic value of the settlement in its business judgment and not to speculate on why shareholders opt-out of class actions.

The Objectors also argue that this Court should delay its ruling until the Ninth Circuit renders its decision on the appeal of the Epstein action. This Court is most reluctant to take any action that could be construed as attempting to interfere with the appellate process in the federal courts. However, as noted above, the Ninth Circuit denied the Epstein plaintiffs' motion for expedited argument after being advised of the proposed settlement hearing in this Court and there is no indication of when that court might rule. If this Court rejects the settlement, the $2 million dollar benefit will vanish.

The law favors voluntary settlements. *In re* Resorts International Shareholders Litigation Appeals, Del.Supr., 570 A.2d 259, 265-66 (1990). Unless fair settlements are promptly approved, the settlement process will be adversely impacted. Therefore, the Objectors' request that this Court indefinitely delay its review of the settlement must be denied.

Objector Marion Minton also objects to the settlement on the basis that many shareholders whose shares were held in

"street names" by Dean Witter did not receive timely notice. However, the uncontradicted evidence is that the responsibility for any delay rests with Dean Witter. A shareholder who holds her shares in a "street name" assumes responsibility for any delays in notice that are attributable to the delay attendant in forwarding notice through the "street name". *Enstar v. Senouf*, Del.Supr., 535 A.2d 1351, 1354-55 (1987). Nonetheless, as a matter of equity, the proposed order implementing this opinion shall be amended to provide that any opt-outs received after the deadline set forth in the settlement notice but before the date of this decision will be effective.

Finally, the objectors argue that the proposed settlement is collusive. They argue that the defendants "cut a deal" with the plaintiffs and their attorneys in this Delaware action to achieve a settlement of the federal claims which plaintiffs and their attorneys in this litigation were unable to assert (but can only settle) instead of negotiating with the Epstein plaintiffs and their attorneys whom they allege understand the true fair value of those federal claims.

The potential for this type of abuse clearly exists in representative litigation. *See Stepak v. Tracinda Corp.*, Del. Ch., C.A. No. 8457-NC, Allen, C. (Aug. 18, 1989). *slip op.* at 15-16. And when the settling parties have previously proposed a patently inadequate settlement in which the class would have received no monetary benefit but the attorneys would have received $1 million in fees (as the initial, now-rejected, settlement provided), suspicions abound. Suspicion, however, is not enough and the objectors have offered no evidence of any collusion. The proposed settlement must therefore be approved.

III

Plaintiffs' attorneys have applied for a total of $691,057.68 in attorneys' fees and expenses which represents approximately 35% of the settlement fund of $2 million.

The law governing the award of attorneys' fees in corporate litigation is well-established in Delaware. Where the efforts of a plaintiff on behalf of the stockholders of a corporation result in

the creation of a common fund or the conferring of a corporate benefit, the Court may, in its discretion, award attorneys' fees. *Tandycrafts, Inc. v. Initio Partners*, Del-Supr., 562 A.2d 1162, 1164 (1989).

The factor usually accorded the greatest weight in a discretionary award of attorney fees is the benefit produced by the litigation. I/M of the Appraisal of Shell Oil Co., Del. Ch., C.A. No. 8080-NC, Hartnett, V.C. (Oct. 30, 1992); *in re Maxxam Group, Inc. Stockholders Litigation*, Del. Ch., C.A. No. 8636-NC, Allen, C. (Apr. 16, 1987), *slip op.* at 31. "In many, perhaps most, cases it will be clear that the entire benefit is directly and entirely attributable to the litigation." *Id.* However, if the Court determines that the benefit was partly caused by the shareholder litigation and partly caused by the activities of others the award of attorneys' fees will be reduced. *Id.* at 31-34; *Aaron v. Parsons*, Del.Supr., 144 A.2d 155 (1958); *Dow Jones & Co. v. Shields (In re Telerate, Inc. Shareholders Litigation)*, Del. Ch., C.A. No. 11, 115-NC, Hartnett, V.C. (March 4. 1992).

In this litigation, the defendants' willingness to create the settlement fund seems likely to have been motivated as much by their concern as to their potential liability under the federal claims as by their concern for liability under the state law claims which this Court characterized as "extremely weak". *MCA*, 598 A.2d 694. Therefore, although this Delaware action may be the vehicle under which the more meritorious federal claims are settled, this does not mean that the Delaware action was entirely responsible for the benefits produced.

Even if this litigation was responsible for the production of the entire settlement fund, plaintiffs' application for 35% of that fund is excessive considering the factors set forth in *Sugarland Industries, Inc. v. Thomas*, Del.Supr., 420 A.2d 142 (1980). In addition to the value of the benefit, this Court must also consider the stage at which the litigation was concluded and the amount of work necessary to produce the benefit. I/M of the Appraisal of Shell Oil Co., Del. Ch., C.A. No. 8080-NC (Consolidated), Hartnett, V.C. (Oct. 30, 1992), *slip op.* at 19-20 (citing *Sugarland Industries, Inc. v. Thomas*, Del.Supr., 420 A.2d 142 (1980)). While plaintiffs' counsel allegedly expended in excess of

3,300 hours in connection with this litigation, in cases involving shareholder litigation similar to this action, "[t]his Court has properly awarded much less than 25% of the benefit, especially where cases have been settled long before trial." *Id.* at 20 (citations omitted). Ultimately, the amount of attorneys' fees that should be awarded is left to the informed discretion of this Court. *See Tandycrafts, Inc. v. Initio Partners*, Del.Supr., 562 A.2d 1162, 1166 (Chancery Court has "plenary power" over allowance of attorneys' fees). Having considered all the factors discussed in *Sugarland*, especially the meager benefit achieved by the litigation, the stage at which the proceeding was ended, the time and effort of counsel, the relative complexities of the litigation, the contingency factor and the standing and ability of counsel—I find that plaintiffs should be awarded a total of $250,000 in attorneys' fees and expenses.

IV

The settling parties shall submit an amended proposed order.

IN THE
COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE MCA INC. SHAREHOLDERS LITIGATION	CONSOLIDATED C.A. No. 11740

ORDER AND FINAL JUDGMENT

On this 22 day of February, 1993 a hearing having been held before this Court to determine whether the terms of the Stipulation of Settlement dated October 22, 1992 (the "Stipulation"), and the terms and conditions of the settlement proposed in the Stipulation (the "Settlement"), and all transactions referred to therein or preparatory or incident thereto, are fair, reasonable and adequate for the settlement of all claims asserted herein; and whether judgment should be entered in these civil actions (the "Actions") dismissing the Actions on the merits with prejudice as against all of the plaintiffs and all members of the Settlement Class certified in this Court's Order dated October 27, 1992; and the Court having considered all matters submitted to it at the hearing and otherwise and the Court having rendered its Memorandum Opinion dated February 12, 1993 approving the Settlement and awarding attorneys' fees and expenses:

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Notice and Summary Notice (as defined in ¶ 4(b) of the Stipulation), is hereby determined to have been the best practicable notice under the circumstances and in full compliance with Rule 23 of the Court of Chancery and the requirements of due process and it is hereby further determined that the plaintiffs in the Actions, as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class and that the maintenance of this action as a

class action meets all the requirements of Rule 23(a) and (b)(3) of the Court of Chancery.

2. The Stipulation and the Settlement are approved as fair, reasonable and adequate and in the best interests of the plaintiffs and the Settlement Class, and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation, provided that any additional Requests for Exclusion received after the deadline set in paragraph 6 of the Hearing Order dated October 7, 1992 but prior to February 12, 1993 will be effective.

3. (a) The Actions are hereby dismissed with prejudice on the merits as to all defendants in the Actions (regardless of whether any such defendant has been served or entered an appearance in any of the Actions) and their respective present and former officers, directors, employees, agents, attorneys, financial advisors, commercial bank lenders, investment bankers, representatives, trustees, affiliates, associates, parents, subsidiaries, general and limited partnerships, heirs, executors, administrators, successors and assigns (including Lazard Freres & Co. (financial advisor to MCA), Allen & Co. Inc. (financial advisor to Matsushita) and Creative Artists Agency Inc. (advisor to Matsushita)) (collectively, the "Released Persons"), as against plaintiffs and all members of the Settlement Class (other than those who have validly requested exclusion therefrom) and their successors and assigns, whether known or unknown, whether directly or in any other capacity, without costs except as provided in the Stipulation, such dismissal to be subject only to compliance by the parties with the terms and conditions of the Stipulation and any Order of this Court with reference to the Stipulation.

(b) All claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, any rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class (other than those who have validly requested exclusion therefrom), whether directly, derivatively, representatively or in any other capacity, against any of

the Released Persons or against anyone else in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement (except for compliance with the Settlement), or any matters, transactions or occurrences referred to in the December 4, 1990 Claim Letter and the Amended Complaint in the Action, or the fiduciary or disclosure obligations of any of the Released Persons with respect to any of the foregoing, and including without limitation the claims asserted in the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action (all as defined in the Stipulation) (all of which are hereinafter collectively referred to as the "Settled Claims") are hereby compromised, settled, released and discharged with prejudice by virtue of the proceedings herein and this Order and Final Judgment.

4. The plaintiffs and all members of the Settlement Class (other than those who have validly requested exclusion therefrom), their successors and assigns, whether acting directly, derivatively, representatively or in any other capacity, are hereby permanently barred and enjoined from instituting or prosecuting any other action in any court of this or any other jurisdiction based upon, relating to, or for the purpose of enforcing any of the Settled Claims.

5. Plaintiffs' attorneys of record herein are hereby awarded the sum of $250,000 in fees and reimbursement of expenses in connection with the Actions, which sum the Court finds to be fair and reasonable and which shall be paid to plaintiffs' attorneys according to the terms set forth in the Stipulation. Said sum shall accrue interest and be paid in accordance with paragraph 8 of the Stipulation.

/s/

.....

Vice Chancellor

Appendix E

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

IN RE MCA, INC. SHAREHOLDERS LITIGATION	No. 126, 1993 Court Below: Court of Chancery of the State of Delaware in and for New Castle County C.A. No. 11740 Consolidated

Submitted: September 21, 1993
Decided: September 21, 1993

Before MOORE, WALSH and HOLLAND, Justices.

ORDER

This 21st day of September, 1993, the Court having considered this matter at oral argument and having concluded that the same should be affirmed on the basis of and for the reasons assigned by the Court of Chancery in its Opinion dated February 12, 1993, as confirmed by the Order and Final Judgment of February 22, 1993.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery be, and the same hereby is,

AFFIRMED.

BY THE COURT:

/s/
Justice

Appendix F

IN THE
COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE MCA INC. SHAREHOLDERS LITIGATION	CONSOLIDATED C.A. No. 11740

NOTICE OF PENDENCY OF CLASS ACTIONS, CLASS ACTION DETERMINATION, PROPOSED SETTLEMENT OF CLASS ACTIONS, SETTLEMENT HEARING, RIGHT TO REQUEST EXCLUSION AND RIGHT TO APPEAR

To: All Record Holders And Beneficial Owners Of Common Stock Of MCA INC. On Or After September 25, 1990, And Their Successors In Interest, Immediate Or Remote. All Record Holders Are Requested By The Court To Forward This Notice To Their Beneficial Owners.

The Notice is given pursuant to Rule 23 of the Court of Chancery of the State of Delaware in and for New Castle County (the "Court") and an Order of the Court (the "Hearing Order") entered in the above-captioned consolidated action to inform you of these pending lawsuits (the "Delaware Actions"), to advise you of a proposed settlement of the Delaware Actions and of your rights, among other things, to exclude yourself from the proposed settlement, to participate in the hearing on, or to object to, the proposed settlement and to give you notice of a hearing to be held by the Court of Chancery of the State of Delaware in and for New Castle County on January 21, 1993, at 12:00 noon to determine whether the proposed settlement should be approved as fair, reasonable, and adequate and to consider the application by plaintiffs' counsel for attorneys' fees and costs.

NOTICE TO PERSONS HOLDING RECORD OWNERSHIP ON BEHALF OF OTHERS

If you were a record (but not the beneficial) owner of common stock of MCA INC. ("MCA" or the "Company"), on September 25, 1990, or any time thereafter, through and including January 3, 1991, you should within fourteen (14) days of the receipt of this Notice, either (a) forward this Notice to each such beneficial owner or (b) mail a list of the names and addresses of each such beneficial owner to Simpson Thacher & Bartlett, 425 Lexington Avenue, New York, New York 10017, (212) 455-3849, Attention: Alex Fan, with a request that copies of the Notice be mailed to such beneficial owners. If you are a nominee holder and wish additional copies of this Notice, additional copies of this Notice will be made available to you for this purpose upon request directed to the foregoing address or telephone number. Nominee holders will be reimbursed their reasonable costs and expenses incurred in complying with the foregoing directives of this paragraph.

NO OPINION EXPRESSED BY THE COURT AS TO THE MERITS

This Notice is not an expression by the Court as to the merits of any claims or defenses asserted by the parties in the Delaware Actions.

BACKGROUND AND DESCRIPTION OF THE ACTIONS

The following is a summary of certain of the facts and procedural history underlying the instant litigation and the Settlement. A more detailed summary of the background of the transactions in question appears in the Offer to Purchase dated November 30, 1990 and the Solicitation/Recommendation Statement of MCA INC. which were mailed on or about November 30, 1990 to holders of record of common stock of MCA. Copies of the Offer to Purchase and MCA's Recommendation are contained in the Tender Offer Statement Pursuant to Section

14(d)(1) of the Securities Exchange Act and the Schedule 14D-9 Pursuant to Section 14(d)(4) of the Securities Exchange Act, respectively, which schedules are on file at the Securities and Exchange Commission in Washington, D.C.

On September 25, 1990, it was reported in the financial press that MCA was discussing a possible acquisition of MCA by Matsushita Electric Industrial Co., Ltd. ("Matsushita").

On September 26, 1990 and September 27, 1990, three putative class actions, brought on behalf of all public shareholders of MCA, were filed in the Court of Chancery, entitled *Lazar, et al. v. MCA INC., et al.*, No. 11740 (filed Sept. 26, 1990) (the "*Lazar* Action"); *Stepak, et al. v. MCA INC., et al.*, No. 11741 (filed Sept. 26, 1990); and *Naphtali, et al. v. MCA INC., et al.*, No. 11747 (filed Sept. 27, 1990) (collectively, unless otherwise indicated, the "Delaware Actions"). The Delaware Actions sought, among other things, an order directing MCA to take all appropriate steps to effectively expose MCA to the marketplace in an effort to obtain a transaction which would yield the greatest value for the stockholders of the Company. Named as defendants in the Delaware Actions were MCA and its directors: Lew R. Wasserman ("Wasserman"), Thomas V. Jones, Robert S. Strauss, Thomas Wertheimer, Howard H. Baker, Jr., Thomas P. Pollack, Felix G. Rohatyn, Signey J. Sheinberg ("Sheinberg"), Howard P. Allen, Mary Gardiner Jones, and Charles S. Paul. Upon consent of all parties, and by Stipulation and Order dated October 2, 1990, the Court consolidated the Delaware Actions under the Caption *In Re MCA INC. Shareholders Litigation*, Consolidated C.A. No. 11740; designated the Complaint in the *Lazar* Action as the Complaint in the Delaware Actions; and appointed as co-lead counsel the firms of Milberg Weiss Bershad Specthrie & Lerach; Abbey & Ellis; Berger & Montague; and Wolf, Popper, Ross, Wolf & Jones ("Plaintiffs' Lead Counsel").

On September 26, 1990, a putative class action, brought on behalf of all public shareholders of MCA, was filed in the Superior Court of California, entitled *Lazar, et al. v. MCA INC., et al.*, No. BC011305, and on October 2, 1990, a stockholders' derivative action, brought on behalf of MCA, was filed in the

Superior Court of California, entitled *MCA INC., derivatively by Robert Silverstein v. Lew R. Wasserman, et al.*, Case No. BC011572 (collectively, the "California State Actions"). The California State Actions (which were ultimately dismissed without prejudice on September 4, 1991), asserted substantially similar claims and sought substantially similar relief as the claims asserted and the relief sought in the Delaware Actions.

On November 26, 1990, MCA and Matsushita announced that they had entered into an Agreement and Plan of Merger (the "Merger" and the "Merger Agreement"). Pursuant to the Merger Agreement, Matsushita Acquisition Corp. ("Matsushita Acquisition"), an indirectly wholly-owned subsidiary of Matsushita, agreed, among other things, to make a tender offer for all outstanding shares of MCA common stock at $66 per share (the "Tender Offer"). Following successful completion of the Tender Offer, upon the terms and subject to the conditions of the Merger Agreement and the Delaware General Corporation Law, Matsushita Acquisition Corp. merged with and into MCA, effective January 3, 1991. The Merger consideration was the same price per share paid in the Tender Offer.

Pursuant to a Capital Contribution and Loan Agreement (the "Capital Contribution Agreement") between Lew R. Wasserman, Matsushita, and Matsushita Holding Corp. ("Matsushita Holding"), a wholly-owned subsidiary of Matsushita, Wasserman agreed to and did contribute, following the acceptance for payment of MCA shares in the Tender Offer, 4,953,927 shares of MCA common stock in exchange for preferred stock in Matsushita Holding. The Preferred stock received by Wasserman had an aggregate liquidation preference equal to $66 multiplied by the number of shares of common stock contributed by Wasserman. The Preferred Stock provides for the payment of an annual cumulative 8.75% dividend.

MCA also entered into certain employee compensation arrangements (as described in the Solicitation/Recommendation Statement of MCA filed on November 30, 1990 on SEC Schedule 14D-9). Matsushita further entered into agreements with

Sidney J. Sheinberg and David Geffen (the "Tender Agreements") providing for such individuals to tender their MCA shares into the Tender Offer.

MCA and an MCA subsidiary which held MCA's broadcasting assets simultaneously entered into a separate Distribution Agreement pursuant to which ownership of MCA's broadcasting assets were spun-off 100% to the MCA shareholders. The consummation of the Tender Offer for MCA's shares was conditioned upon MCA's broadcasting assets having been spun-off. The material terms of the above-mentioned agreements have been publicly available since November 30, 1990 and are further described in the Offer to Purchase and MCA's Recommendations referred to above.

Following public announcement of the Merger Agreement, counsel for plaintiffs in the Delaware Actions informed counsel for defendants that they intended to seek preliminary injunctive relief against consummation of the Merger Agreement, and they initially undertook to state the bases for such injunction motion and describe the claims against the Merger Agreement in writing by December 4, 1990, and later to file an amended complaint.

By letter dated November 27, 1990, the Delaware Chancery Court advised plaintiffs that their application for preliminary injunctive relief would be heard on December 20, 1990. The hearing date was subsequently changed to December 18, 1990.

By letter to defendants' counsel dated December 4, 1990 (sometimes referred to as the "December 4, 1990, Claim Letter"), pursuant to a stipulated procedure submitted to the Court, co-lead counsel for plaintiffs in the Delaware Actions set forth the claims upon which plaintiffs based their motion for a preliminary injunction. These claims advanced by plaintiffs included, among other things, the claims that (i) defendants failed to fulfill their duty to maximize shareholder value and had failed to obtain fair value in the Merger Agreement; (ii) defendants had breached their duty of making fair and full disclosures concerning the Merger Agreement, including, among other things, failing to disclose material facts concerning the compensation and

bonus payments to certain individuals contemplated in the Merger Agreement, and that defendants allegedly intended to retain control over WWOR-TV following spin-off of MCA's broadcast assets to shareholders; (iii) defendants breached their duty of candor by failing to disclose material information concerning the operating segments of MCA that was provided to Matsushita; (iv) defendants breached their fiduciary duties by according "preferential treatment" to defendant Lew R. Wasserman in connection with the Tender Offer, in that "Mr. Wasserman . . . impermissibly negotiated preferential arrangements in connection with the transaction whereby he . . . exchange[d] stock for stock and avoid[ed] costly capital gains taxes to which all other stockholders [were] subject"; and (v) defendants violated SEC Rule 13e-3 because Mr. Wasserman's receipt of preferred stock allegedly established that the transaction was a "going-private" transaction under SEC Rule 13e-3 of the Securities Exchange Act of 1934, and defendants allegedly failed to comply with the requirements of SEC Rule 13e-3 governing such transactions. The December 4 Claim Letter stated that plaintiffs' counsel intended to consider whether to modify and/or supplement the claims and legal theories contained in the Claim Letter as discovery and briefing proceeded.

On December 3, 1990, a putative class action complaint entitled *Epstein v. MCA INC. et al.*, No. CV-90-6451-R, brought on behalf of a class of all shareholders of MCA, was filed in the United States District Court for the Central District of California (the "Federal District Court") (hereinafter, the "*Epstein* Action"). The complaint in the *Epstein* Action, as amended on December 6, 1990, alleged that the arrangements whereby defendant Wasserman exchanged his MCA stock for preferred stock in Matsushita Holding pursuant to the Capital Contribution Agreement (i) violated SEC Rule 10b-13 because it allegedly entailed a purchase of MCA stock by Matsushita outside the Tender Offer during the Tender Offer period, and (ii) violated SEC Rule 14d-10 because the preferred stock received by Wasserman allegedly was different or greater consideration than that made available to public shareholders in the Tender Offer. The complaint was subsequently amended to include a

similar claim under SEC rules 10b-13 and 14d-10 that a payment to defendant Sheinberg, which defendants asserted was a bonus payment derived from the level of incentive compensation that had been expected to be awarded to Sheinberg in the ordinary course but for the acquisition, allegedly constituted additional consideration for his MCA shares. The complaint sought preliminary and permanent injunctive relief and monetary damages. The *Epstein* Action complaint, as subsequently amended, named as defendants MCA, Matsushita, Matsushita Acquisition, Matsushita Holding, Wasserman and Sheinberg.

In or around the beginning of December 1990, plaintiffs' counsel in the Delaware Actions obtained extensive document discovery from defendants and their financial advisors, and thereafter took the depositions of certain defendants (including defendants Wasserman, Sheinberg and Howard P. Allen).

Commencing on or about November 29, 1990, counsel for defendants and counsel for plaintiffs engaged in discussions concerning possible settlement of the dispute between the parties. Thereafter, a meeting was held between counsel for the parties and settlement negotiations began in earnest. During those settlement discussions, which continued through December 11, 1990, plaintiffs sought to enhance the terms of the transaction and in particular, sought improvements in the terms of the shareholder rights plan of the spin-off company with a view towards increasing the value of the shares of the spin-off company to be distributed to MCA shareholders.

Following these negotiations, on December 11, 1990, an agreement in principle between the parties hereto was reached providing (as further described below) for the compromise, release and settlement of the claims asserted in the Delaware Actions, the California State Actions, and the *Epstein* Action (hereinafter, the "Initial Proposed Settlement").

On December 11, 1990, the Federal District Court was advised of the existence of the Initial Proposed Settlement and set December 28, 1990, as the date for a hearing on a motion for

summary judgment made by the *Epstein* plaintiff, who contended that the Tender Offer violated SEC Rules 10-b-13 and 14d-10 and should be enjoined. Counsel for plaintiff in the *Epstein* Action stated that his client in *Epstein*, a member of the proposed class in the Delaware Actions, would seek to exclude himself from the Initial Proposed Settlement and that he wished to continue to litigate the claims asserted in the *Epstein* complaint.

An amended consolidated complaint (the "Amended Complaint") in the Delaware Actions was filed on December 14, 1990, which encompassed the claims set forth in the December 4, 1990, Claim Letter. The defendants in the Amended Complaint are MCA, Matsushita, Matsushita Holdings, Matsushita Acquisition, Wasserman, Sheinberg, Thomas P. Pollack, Thomas Wertheimer, Charles S. Paul, Hoard H. Baker, Robert S. Strauss, Felix G. Rohatyn, Thomas V. Jones, Howard P. Allen and Mary Gardiner Jones, all of whom are alleged to have participated in the wrongs alleged in the Amended Complaint. The claims alleged in the Amended Complaint are, *inter alia*, that (i) the individual defendants breached their fiduciary duty to MCA's shareholders by failing to adopt methods calculated to obtain the highest per share value in the sale of MCA, including their alleged failure to use "market check" mechanisms to assure the fairness of the acquisition terms; (ii) the individual defendants breached their fiduciary duty to MCA's shareholders by failing to obtain a fair price per share in the sale of MCA; (iii) the individual defendants treated Matsushita as a preferred bidder, in alleged violation of their fiduciary duty; (iv) the individual defendants, MCA and Matsushita entered into allegedly impermissible preferential treatment arrangements for the treatment of defendant Wasserman's MCA's stock holdings, specifically with respect to the transaction by which he exchanged his MCA stock for preferred stock of a Matsushita subsidiary pursuant to the Capital Contribution Agreement, and that the purpose of such preferential treatment was to allow defendant Wasserman to avoid tax liability on the sale of his MCA stock, which other MCA stockholders will not be able to avoid; (v) the disclosures made by defendants in connection with the Tender Offer,

including without limitation the disclosures contained in Matsushita's Offer to Purchase and Schedule 14D-1, and the disclosures contained in MCA's Schedule 14D-9, were deficient and contain material omissions and misrepresentations, including omissions and misrepresentations with respect to the disclosure of the arrangement concerning receipt of preferred stock by defendant Wasserman pursuant to the Capital Contribution Agreement, and with respect to arrangements regarding benefits and compensation for members of MCA management; (vi) that the MCA board was allegedly not composed of a majority of directors without conflicts of interest with respect to the Merger Agreement; (vii) that the individual defendants allegedly intended to retain effective control over MCA's broadcasting assets after the spin-off of such assets, and that defendants—through adoption of an overly restrictive "poison pill" shareholders rights plan—intended to prevent the emergence of market forces which could result in a sale of the spin-off company at a price representing maximum value for shareholders; (viii) that defendants breached their duty of candor by failing to disclose certain allegedly material information concerning the operating segments of MCA, which information was allegedly provided to Matsushita; (ix) that defendants failed to disclose, in violation of their duty of candor, certain prior market contacts between MCA and other potential purchasers and other material information required to be disclosed pursuant to SEC Rule 13e-3; (x) that the arrangements for employee compensation, including certain employment agreements, bonus payments, and payments with respect to options, violated defendants' fiduciary duties and were not fully and fairly disclosed; and (xi) the individual defendants agreed in the Merger Agreement to treatment of MCA's Yosemite assets that was allegedly not in the best interests of MCA's shareholders. The Amended Complaint seeks predominantly equitable relief, or, alternatively, damages.

On December 17, 1990, a Stipulation of Settlement was executed between counsel for the parties to the Delaware Actions reflecting the terms of the Initial Proposed Settlement (hereinafter, the "Initial Stipulation"). Pursuant to the Initial Stipulation:

1. MCA agreed, *inter alia*, to cause its wholly-owned subsidiary holding its broadcast assets, which by the terms of a Distribution Agreement entered into simultaneously with the Merger Agreement was to be spun-off to MCA shareholders pro rata prior to Matsushita's purchase of shares pursuant to the Tender Offer (the "Spin-off Company"), to adopt a common stock shareholder rights plan that provided, *inter alia*, that, if a fully financed cash tender offer for all of the shares of Spin-off Company common stock was commenced and held open for at least 60 days, then the rights would be automatically redeemed at the redemption price of one cent per share immediately prior the closing of such offer, provided that at least 66⅔% of the outstanding shares of Spin-off Company common stock were tendered into such offer and not withdrawn; that the "flip-in" threshold under such Rights Plan would be 15%; and that these provisions would not be amended for a period of at least one year from the adoption of the plan; and

2. Subject to Court approval, all claims and causes of action asserted in the Delaware Actions, the California State Actions, and the *Epstein* Action, including all claims arising under Delaware common law and the federal securities laws (including the federal securities laws claims asserted in the *Epstein* Action), would be settled, released and discharged; and

3. Counsel for the parties agreed to request the Court to enter an order providing that the Delaware Actions may proceed for settlement purposes as a class action, pursuant to Chancery Court Rules 23(b)(1) and (b)(2), on behalf of all holders of MCA common stock from September 25, 1990, and their successors in interest, immediate or remote (excluding defendants and members of their immediate families) (hereinafter, the "Initial Settlement Class").[45]

[45] In August 1992, all of the common shares of the Spin-Off Company (which was named Pinelands, Inc.) were acquired at a cash price of $18.1184 per Pinelands, Inc. share by BHC Communications Inc. pursuant to an Agreement and Plan of Merger dated as of May 7, 1992.

On December 18, 1990, this Court entered an Order which, among other things, provisionally certified the Initial Settlement Class pursuant to Rules 23(b)(1) and (2) of the Court of Chancery; scheduled a hearing for January 30, 1991, to determine whether the Initial Settlement embodied in the Initial Stipulation was fair, reasonable and adequate and should be approved by the Court; and provided for the mailing of notice of the Initial Settlement to members of the Initial Settlement Class.

On December 28, 1990, the Federal District Court denied the *Epstein* plaintiff's motion for summary judgment. No appeal therefrom was sought to be taken. The Tender Offer expired as scheduled on December 29, 1990, with virtually all of the MCA common shares having been tendered. A second-step cash merger was then consummated on January 3, 1991, by which MCA became a wholly-owned subsidiary of Matsushita.

On January 23, 1991, David Minton and Andrew Minton (purported shareholders of MCA), served a Notice of Intent to Appear and Object to the Initial Proposed Settlement (hereinafter, the "Objection" and the "Objectors"). In principal part, the Objectors argued that the Initial Proposed Settlement improperly purported to release and discharge the claims asserted in the *Epstein* Action without affording members of the putative class the opportunity to opt out of the class and thus not be bound by the proposed release of the federal securities claims contained in the Initial Stipulation and that the claims asserted in the *Epstein* Action were substantial and valuable claims.

On January 30, 1991, a hearing was held before this Court in accordance with the December 18, 1990, Order during which the Court heard and considered, *inter alia*: (i) plaintiffs' application for final approval of the Initial Proposed Settlement; (ii) the arguments pursuant to the Objection; and (iii) plaintiffs' counsels' application for attorneys' fees and reimbursement of expenses.

On April 22, 1991, this Court rendered its decision and order (the "Decision and Order") with respect to plaintiffs' application for final approval of the Initial Proposed Settlement and the arguments raised by the Objectors. Pursuant to the Decision and Order, the Court ruled, *inter alia*, that certification

of the Initial Settlement Class pursuant to Chancery Court Rule 23(b)(2) was appropriate, and that contrary to the arguments raised by the Objectors, no opportunity to opt out by members of the Initial Settlement Class was required. However, the Court rejected plaintiffs' application for final approval of the Initial Proposed Settlement, concluding in this regard that the benefits to be conferred pursuant to the Initial Proposed Settlement were not sufficient consideration of the release and dismissal of the claims asserted in the Delaware Actions and the federal claims asserted in the *Epstein* Action. The Court stated in its Decision and Order, *inter alia,* that the state law claims proposed to be settled had "little or no merit and therefore no value"; that the value of the Initial Proposed Settlement was "also minimal"; and that the federal claims asserted in the *Epstein* Action "have at least arguable merit and therefore significant value." As to such federal claims, the Court found that the issues raised by such claims had "not yet been definitively addressed by the courts" and therefore the claims had "arguable merit." the Court concluded "that it would be unfair to bar the federal claims and therefore the settlement cannot be approved in its present form."

During December 1990 and January 1991, four purported class actions, brought on behalf of MCA shareholders, were filed in the Federal District Court, entitled *Linder v. MCA INC. et al.*, No. CV-90-6744-KN (filed on December 18, 1990) (the "*Linder* Action"); *Rockford v. MCA INC., et al.*, No. CV-90-6744-JMI (filed on December 18, 1990) (the "*Rockford* Action"); *Karlin, et al. v. MCA INC., et al.*, No. CV-90-6775-R) (filed December 18, 1990) (the "*Karlin* Action"); and *Minton v. MCA INC., et al.*, No. CV-91-0336-R (filed on January 17, 1991 (the "*Minton* Action"). The *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action assert substantially similar claims and seek substantially similar relief as the claims asserted and the relief sought in the *Epstein* Action. Unless otherwise indicated, the *Epstein* Action, the *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action—all of which were consolidated by the Federal District Court on April 1, 1991—are collectively referred to herein as the "California Federal Actions", and the plaintiffs in the California Federal Actions are hereinafter referred to as the "Federal Plaintiffs."

Subsequent to the Court's Decision and Order, the following events occurred in one or all of the California Federal Actions: (i) On April 1, 1991, the Federal District Court denied the second motion by one of the Federal Plaintiffs for summary judgment on the SEC Rule 10b-13 and 14d-10 claims, and denied the Federal Plaintiffs' first motion for class certification; (ii) On July 1, 1991, the Federal District Court granted the Matsushita defendants' motion to dismiss the claims asserted against them under SEC Rule 10b-13 on the ground that no private right of action exists under that provision, and dismissed all claims asserted against MCA and Messrs. Wasserman and Sheinberg for failure to state a claim as to them; (iii) On September 3, 1991, the Federal District Court denied the Federal Plaintiffs' second motion for class certification; (iv) On November 4, 1991, prior to the completion of discovery, the Federal District Court denied a motion for summary judgment by the Matsushita defendants against the remaining Rule 14d-10 claim, while also denying the third motion for summary judgment by the Federal Plaintiffs; (v) On December 9, 1991, the Federal District Court enjoined the Federal Plaintiffs and their counsel from commencing any new litigation arising out of the MCA acquisition against any defendant in the California Federal Actions or amending the pleadings to add new parties in any previously-filed actions against any defendant in the actions relating to the MCA acquisition in any forum without prior leave of the Federal District Court; (vi) On December 16, 1991, the Federal District Court denied the Federal Plaintiffs' motion to amend their complaint to assert additional claims under Sections 14(d)(7) and 14(e) of the Williams Act; (vii) On January 6, 1992, the Federal District Court denied plaintiff in the *Minton* Action leave to amend his complaint to assert a claim under Section 14(d)(7) of the Williams Act; (viii) On January 13, 1992, the Federal District Court permitted the voluntary dismissal of all of the plaintiffs in the *Karlin* Action from the California Federal Actions; (ix) On January 27, 1992, after full briefing and a hearing, the Federal District Court found each of the Federal Plaintiffs, including the *Karlin* plaintiffs, and their counsel, in contempt of Court for their continued failure to provide Matsushita with all discovery ordered to be produced in the Federal

District Court's Order of November 4, 1991, and subsequently awarded sanctions to Matsushita in the amount of $15,000; (x) on February 10, 1992, the day before trial on the merits was set to commence, and after the completion of discovery, the Federal District Court granted the Matsushita defendants' motion for summary judgment dismissing the remaining claim under SEC Rule 14d-10 and permanently enjoined the Federal Plaintiffs and their counsel, and all persons in active concert or participation with them (or having notice of the order), from commencing litigation in any forum involving claims or defenses arising out of the same transactions as the California Federal actions between the parties, without prior leave of the Federal District Court; (xi) On March 3, 1992, upon the Matsushita defendants' motion to supplement the record, the Federal District Court found that plaintiff and purported class representative Lawrence Epstein prosecuted the California Federal Actions for 15 months under false pretenses because he deliberately concealed that the MCA stock owned by him was held in a tax-free individual retirement account. The Federal District Court found that this fact demonstrated that plaintiff Epstein did not and could not have sustained any injury as a result of the Tender Offer, and, if known, would have disqualified him as a plaintiff in the California Federal Actions.

Plaintiffs in the California Federal Actions have appealed the Federal District Court's dismissals of their actions to the United States Court of Appeals for the Ninth Circuit. The Federal Plaintiffs have also appealed the denials of their motions for class certification and other rulings made by the Federal District Court, including the contempt ruling referred to above.

On October 30, 1991, David and Andrew Minton, children of plaintiff Walter Minton, filed a putative class action complaint in the Federal District Court, entitled *Minton, et al. v. MCA INC., et al.*, No. CV-91-5914-R (hereinafter, the "Second *Minton* Action"). The complaint in the Second *Minton* Action, as amended on December 9, 1991, sought monetary damages for alleged violation of SEC Rules 10b-13 and 14d-10 and Section 14(d)(7) of the Williams Act. The amended complaint alleged that the arrangements whereby defendant Wasserman exchanged his MCA stock for preferred stock in Matsushita

Holding Corp. pursuant to the Capital Contribution Agreement (1) violated SEC Rule 10b-13 because it allegedly entailed a purchase of MCA stock by Matsushita during the period covered by the Rule that was not pursuant to the Tender Offer, and (2) violated Section 14(d)(7) of the Williams Act and SEC Rule 14d-10 because such preferred stock received by Wasserman allegedly represented different and/or greater consideration than that made available to public shareholders in the Tender Offer. By Order dated February 11, 1992, the Federal District Court granted defendants' motion to dismiss the amended complaint, finding that it was filed in bad faith and that plaintiffs and their father, Walter Minton, were aligned in interest. Plaintiffs David and Andrew Minton have appealed the Federal District Court's dismissal of their complaint to the United States Court of Appeals for the Ninth Circuit. The appeals filed in the California Federal Actions and the Second Minton Action (Nos. 92-55288, 92-55632, 92-55675, 92-55677) are pending, with briefing scheduled to be completed by the end of this year, and no date for argument of the appeals has been set by the Court.

On November 4, 1991, a putative class action, allegedly brought on behalf of all shareholders of MCA as of the close of trading on November 23, 1990, was commenced against Lazard Freres & Co. ("Lazard") in the Supreme Court of the State of New York, County of New York, entitled *Epstein v. Lazard Freres & Co.*, No. 31127/91 (hereinafter, the "Second *Epstein* Action"). The complaint in the Second *Epstein* Action alleged that Lazard, which served as financial advisor to MCA in connection with its acquisition by Matsushita, was negligent and breached a fiduciary duty in its advice to MCA concerning the fairness of the transaction price, and that Lazard had a conflict of interest with respect to its MCA engagement. The complaint seeks damages, and alleges that the difference between the value paid to the shareholders in the acquisition and "fair value" represents "damages of no less than approximately $250 million and possibly as much as $1.2 billion."

By decision dated September 24, 1992, the New York court granted a motion by Lazard to dismiss the Second *Epstein* Action with prejudice under principles of *res judicata* in light of

the entry of judgment in favor of the defendants and against the plaintiffs in the California Federal Actions.

From and after this Court's Decision and Order declining to approve the Initial Proposed Settlement, counsel for the parties in the Delaware Actions continued to discuss a possible alternative resolution of the Delaware Actions. In or around February 1992, following the Federal District Court's decision to dismiss the remaining claim in the California Federal Actions, these discussions developed into negotiations in earnest regarding an alternative settlement of the Delaware Actions. On June 18, 1992, counsel for the parties arrived at an agreement in principle to settle the Delaware Actions, subject to the execution of a formal Stipulation of Settlement and Court approval thereof.

CLASS ACTION DETERMINATION

The Hearing Order provides that the Delaware Actions shall and may be maintained as a class action, for purposes of settlement only, by the plaintiffs as class representatives and by their counsel as class counsel, pursuant to Chancery Rules 23(a) and (b)(3), on behalf of a class consisting of all holders of MCA common stock on and after September 25, 1990, and their successors in interest, immediate or remote, through and including effectuation of the Merger on January 3, 1991 (excluding defendants and their immediate families) (hereinafter, the "Settlement Class" and the "Class Period"). The Hearing Order also provides that members of the Settlement Class may exclude themselves from the Settlement Class if they so desire, as further described below under the heading "Right to Request Exclusion."

THE SETTLEMENT

Pursuant to the proposed Settlement, defendants have agreed that, in consideration for the dismissal of the Delaware Actions and the release and settlement of the Settled Claims (as defined below), defendants will deposit $2,000,000 (plus interest as described below) into a settlement fund (the "Settlement Fund") to be distributed *pro rata* to those members of the

Settlement Class whose shares of MCA common stock were purchased pursuant to the Tender Offer or were cashed out or converted pursuant to the Merger, as reflected on the records of MCA's transfer agent, such monies to be deposited at such time as the Settlement shall become final in accordance with its terms. According to MCA's records of stockholders, and subject to reduction by the number of shares of MCA common stock formerly held by persons who file valid Requests for Exclusion from the Settlement Class (as described below), distribution of the Settlement Fund would be pro-rated among the former holders of approximately 78 million MCA shares. The Settlement also provides that beginning on the next business day after an Order and Final Judgment is entered by the Court of Chancery, the Settlement Fund shall accrue interest at a compound rate of 3% per annum and continue to earn interest at such rate until the Settlement Fund is fully and finally distributed pursuant to the terms of the Stipulation.

In consideration of the foregoing, pursuant to the proposed Settlement plaintiffs in the Delaware Actions have agreed to dismiss, release, and discharge the Settled Claims (as defined below) against the Released Persons (as defined below). Thus, the Stipulation provides that, if the Settlement is approved by the Court, all claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, the rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class, whether directly, derivatively, representatively or in any other capacity, against any of the named defendants in the Delaware Actions (regardless of whether such defendant has been served or entered an appearance in any of the actions) and their respective present and former officers, directors, employees, agents, attorneys, financial advisors, commercial bank lenders, investment bankers, representatives, trustees, affiliates, associates, parents, subsidiaries, general and limited partners and partnerships, heirs, executors, administrators, successors, and assigns, including without limitation Lazard (financial advisor to MCA), Allen & Co. Inc. (financial advisor to Matsushita) and Creative Artists Agency Inc.

(advisor to Matsushita) (the "Released Persons"), or against anyone else in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement (except for compliance with the Settlement), or any matters, transactions or occurrences referred to in the December 4, 1990, claim letter or the Amended Complaint in the Delaware Actions, or the fiduciary or disclosure obligations of any of the Released Persons with respect to any of the foregoing, and including without limitation the claims asserted in the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action (all of which are hereinafter collectively referred to as the "Settled Claims"), shall be compromised, settled, released and discharged with prejudice.

REASONS FOR SETTLEMENT

Plaintiffs' attorneys in the Delaware Actions represent that as a result of extensive investigation of the facts and examination of applicable law, including depositions and review of thousands of pages of documents relating to the transactions complained of, plaintiffs and their attorneys have concluded that it is desirable and in the best interests of the members of the Settlement Class to settle the litigation upon the terms and conditions set forth in the Stipulation of Settlement. In reaching their conclusion to settle the Delaware Actions on the terms negotiated, these plaintiffs and their attorneys have concluded that the terms and conditions of the proposed Settlement are fair, reasonable and adequate, and have agreed to settle the Delaware Actions, pursuant to the terms and provisions of the Stipulation, after considering (i) the substantial monetary benefits that former MCA shareholders will receive pursuant to the Settlement; (ii) the Court's evaluation of the claims asserted in the Delaware Actions as reflected in the Decision and Order; (iii) the attendant risks and delays of continued litigation; (iv) uncertainties relating to proof of the allegations asserted in the Delaware Actions; (v) the Federal District Court's disposition of the federal securities claims asserted in the California Federal Actions and the Second

Minton Action; (vi) the impact of principles of *res judicata* on the viability of the Second *Epstein* Action in light of the Federal District Court's disposition of the California Federal Actions, including the decision of the New York Court to dismiss the Second *Epstein* Action with prejudice on *res judicata* grounds; and (vii) the fact that the present Settlement provides a mechanism for members of the Settlement Class to exclude themselves from the Settlement Class should they so desire and thereby not to be precluded by the Settlement from individually seeking to pursue the claims alleged in the Delaware Actions, the California Federal Actions, the Second *Minton* Action, the Second *Epstein* Action or any other claims relating to the events at issue in the Delaware Actions.

DEFENDANTS' DENIAL OF LIABILITY

Defendants vigorously deny all liability with respect to the facts and claims alleged in the Delaware Actions, but consider it desirable that they be settled and dismissed because such settlement and dismissal would: (i) avoid the substantial burden, expense, inconvenience and distraction of continued litigation; and (ii) put the Settled Claims to rest.

NOTICE OF HEARING

Notice is hereby given that a hearing will be held before the Court in the Public Building, 11th and King Streets, Wilmington, Delaware 19801, on January 21, 1993 at 12:00 noon (the "Hearing") (or at such adjourned time as the Court may, without further notice, direct) to determine (a) the fairness, reasonableness, and adequacy of the terms of the Stipulation of Settlement, and (b) whether an order and final judgment should be entered approving the proposed settlement and compromise and dismissing on the merits and with prejudice the Delaware Actions against the defendants and to hear plaintiffs' application for an order allowing payment to plaintiffs in the Delaware Actions for reasonable attorneys' fees and expenses in connection with the Delaware Actions, as more fully described below under the heading "Attorneys' Fees and Expenses."

The Court has reserved the right to adjourn the Hearing from time to time at such hearing or any adjournment thereof, by announcement at the Hearing or any adjournment thereof. The Court has also reserved the right to approve the Stipulation of Settlement, with or without modifications, and to enter its final judgment dismissing the Delaware Actions as to defendants on the merits and with prejudice and to approve the payments of plaintiffs' attorneys' fees and expenses without further notice of any kind.

RIGHT TO REQUEST EXCLUSION

All members of the Settlement Class have the option of excluding themselves from the Settlement Class by mailing a timely and valid Request for Exclusion postmarked no later than twenty (20) days prior to the Settlement Hearing to In re MCA INC. Shareholders Litigation, P.O. Box 92, Wilmington, DE 19899.

As set forth above, the Settlement provides for the release and discharge as to members of the Settlement Class of the claims alleged in the Delaware Actions, as well as those alleged in the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action. By filing a valid Request for Exclusion, a member of the Settlement Class will not be precluded by the Settlement from individually seeking to pursue the claims alleged in the Delaware Actions, the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action, or any other claim relating to the events at issue in the Delaware Actions. Accordingly, any member of the Settlement Class who is considering whether to exercise his or her right of exclusion as descried herein may wish to consider the status of these proceedings and the Federal District Court's disposition of the claims asserted in the California Federal Actions and the Second *Minton* Action. *See* "Background and Description of the Actions." For further information concerning the California Federal Actions and the Second *Minton* Action, you are referred to the documents filed with the United States District Court for the Central District of California, 312 North Spring Los Angeles,

California 90012. For further information concerning the Second *Epstein* Action, you are referred to the documents filed with the Supreme Court for the State of New York, County of New York, 60 Centre Street, New York, New York 10007.

A Request for Exclusion must set forth the following information with respect to the person or entity requesting exclusion: name, address, social security or taxpayer identification number, the amount of all MCA common stock you owed during the Class Period (*i.e.*, the number of shares held or purchased on September 25, 1990 to January 3, 1991, the date of each purchase or sale (if any), during such period and the number of shares in any such transaction. All Requests for Exclusion must be signed by or on behalf of the person or entity so requesting exclusion.

If a Request for Exclusion does not include all of the foregoing information, it shall not be a valid Request for Exclusion and the person or entity filing an invalid Request for Exclusion shall be a member of the Settlement Class. *All persons who properly file Requests for Exclusion from the Settlement Class shall not be members of the Settlement Class and shall have no rights with respect to the settlement and no interest in the Settlement Fund.*

RIGHT TO APPEAR

Any person who has not requested exclusion from the Settlement Class who objects to the Stipulation, the Settlement, the judgment to be entered herein, or the award of attorneys' fees and expenses to plaintiffs' counsel, or who otherwise wishes to be heard, may appear in person or by his attorney at the Hearing and present any evidence or argument that may be proper and relevant. However, no such person shall be heard and no papers, briefs, pleadings or other documents submitted by any person shall be received and considered by the Court (unless the Court in its discretion shall thereafter otherwise direct, upon application of such person and for good cause shown), unless no later than twenty (20) days prior to the Hearing directed herein to be held on January 21, 1993, at 12:00 noon, such person shall file

with the Register in Chancery and, before such filing, shall serve upon:

Joseph A. Rosenthal, Esq.
ROSENTHAL, MONHAIT,
GROSS & GODDESS, P.A.
First Federal Plaza
P.O. Box 1070
Wilmington, Delaware 19899

On Behalf Of All Plaintiffs

Martin P. Tully, Esq.
MORRIS, NICHOLS, ARSHT &
TUNNELL
1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 10900

On Behalf Of Defendant MCA INC.
And The Individual Defendants

-and-

R. Franklin Balotti, Esq.
RICHARDS, LAYTON
& FINGER
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899

On Behalf Of Defendants Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corp. And Matsushita Acquisition Corp.

(a) notice of intention to appear; (b) a detailed statement of such person's specific objections to any matter before the Court; (c) proof of membership in the Settlement Class; and (d) the grounds for such objections and any reasons why such person

desires to appear and to be heard, as well as all documents or writings which such person desires this Court to consider.

Unless the Court otherwise directs, no person shall be entitled to object to the approval of the Stipulation of Settlement, the Settlement, the judgment to be entered herein, or the award of attorneys' fees and expenses to plaintiffs' counsel, or otherwise to be heard, except by serving and filing written objections as described above. Any person who fails to object in the manner prescribed above shall be deemed to have waived such objections and shall be forever barred from raising such objection in this or any other action or proceeding.

ATTORNEYS' FEES AND EXPENSES

Plaintiffs' counsel in the Delaware Actions will jointly apply to the Court at or subsequent to the Hearing for an award of attorneys' fees in the amount of $575,000, plus reimbursement of expenses. Plaintiffs' counsel also intend to apply to the Court of Chancery for provision that any award of attorneys' fees and disbursements with respect to such fee application shall accrue interest at the same interest rate earned by the Settlement Fund through and including the date of payment as more fully described under the heading "The Settlement." Defendants have agreed not to take any position with regard to either application. Any amount awarded by the Court for attorneys' fees and/or disbursements will be paid out of the Settlement Fund of $2.0 million (plus accrued interest) and will accordingly reduce the amount of payments to eligible class members out of the Settlement Fund.

CONDITIONS OF THE SETTLEMENT

The Stipulation provides that the parties have the option to withdraw from the Settlement in the event that (a) the Order and Final Judgment called for in the Stipulation is not entered substantially in the form specified therein (including such modifications thereto as may be ordered by the Court with the consent of the parties), (b) the Settlement is not approved by the Court,

or (c) such order is reversed or substantially modified upon appeal. In addition, the Stipulation provides that defendants have the option to withdraw from the Settlement in the event that there is excluded from the Settlement Class (through the filing of valid Requests for Exclusion) persons who held in excess of that number of MCA common shares which plaintiff and defendants have agreed upon (which number is to be kept confidential by the parties to the Stipulation). In the event any option to withdraw from the Settlement is exercised by any party thereto (as provided for in the Stipulation), or if the Stipulation of Settlement and the Settlement are not approved by the Court or shall not become effective for any reason whatsoever, the Stipulation of Settlement, the Settlement provided therein (including any modification thereto made with the consent of the parties), and any actions taken in connection therewith will be terminated and will become void and have no further force and effect, except for the obligation of MCA to pay for any expenses incurred in connection with this Notice and the administration of the Settlement in the event that the Settlement is not approved.

SCOPE OF THIS NOTICE AND FURTHER INFORMATION

The foregoing description of the Court's Hearing Order, the Delaware Actions, the terms of the Stipulation of Settlement and other matters described herein are only summaries. For the full details of the Delaware Actions, and the terms and conditions of the Settlement, you are referred to the Stipulation of Settlement, the Decision and Order of the Court described herein and the other documents on file with the Court in the Delaware Actions. These documents may be examined by you or your attorney during regular business hours of each business day at the office of the Register in Chancery, Public Building, 11th and King Streets, Wilmington, Delaware 19801.

Questions or communications concerning the Settlement may be directed to the Lead Counsel for the plaintiffs, by contacting Milberg Weiss Bershad Specthrie & Lerach, One

Pennsylvania Plaza, New York, New York 10119-0165, (212) 594-5300.

Dated: Wilmington, Delaware
October 27, 1992

John D. Kelly, III, Register
In Chancery, Court Of Chancery Of The State of Delaware In And For New Castle County

Appendix G

Release Language of the Court Approved Stipulation and Agreement of Compromise of the Delaware Class Action (the "Delaware Settlement"):

1. The Delaware Settlement release provided as follows:

NOW, THEREFORE, IT IS STIPULATED AND AGREED, subject to the approval of this Court, pursuant to Rule 23 of the Court of Chancery Rules, by and between defendants hereto and the plaintiffs for themselves and for the Settlement Class . . . that all claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, and any rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class, whether directly, derivatively, representatively or in any other capacity, against any of the named defendants in the Delaware Actions [including the Matsushita Defendants-Appellees] (regardless of whether such defendant has been served or entered an appearance in any of the actions) and their respective present and former officers, directors, employees, agents, attorneys, financial advisors, commercial bank lender, investment bankers, representatives, trustees, affiliates, associates, parents, subsidiaries, general and limited partners and partnership, heirs, executors, administrators, successors, and assigns including without limitation Lazard (financial advisor to MCA), Allen & Co. Inc. (financial advisor to Matsushita) and Creative Artists Agency Inc. (advisor to Matsushita) or against anyone else (collectively, the "Released Persons") in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement (except for compliance with the Settlement), or any matters, transactions or occurrences referred to in the December 4, 1990, Claim Letter and the Complaint in the Delaware Actions or the fiduciary or disclosure obligations of any of the Released Persons with respect to any of the foregoing, and including without limitation the claims asserted in the California Federal Actions . . . (all of

which are hereinafter collectively referred to as the "Settled Claims"), shall be compromised, settled, released and discharged with prejudice . . . .

A 22-23.

2. The Delaware settlement defined the California Federal Actions as follows:

On December 3, 1990, a putative class action complaint entitled *Epstein v. MCA INC., et al.*, No. CV-90-6451-R, brought on behalf of a class of all shareholders of MCA, was filed in the United States District Court for the Central District of California (the "Federal District Court") (hereinafter, the "*Epstein* Action"). The complaint in the *Epstein* Action, as amended on December 6, 1990, alleged that the arrangements whereby defendant Wasserman exchanged his MCA stock for preferred stock in Matsushita Holding Corp. pursuant to the Capital Contribution Agreement (i) violated SEC Rule 10b-13 because it allegedly entailed a purchase of MCA stock by Matsushita outside the Tender Offer during the Tender Offer period, and (ii) violated SEC Rule 14d-10 because the preferred stock received by Wasserman allegedly was different or greater consideration than that made available to public shareholders in the Tender Offer. The complaint was subsequently amended to include a similar claim under SEC Rules 10b-13 and 14d-10 that a payment to defendant Sheinberg, which defendants asserted was a bonus payment derived from the level of incentive compensation that had been expected to be awarded to Sheinberg in the ordinary course but for the acquisition, allegedly constituted additional consideration for his MCA shares. The complaint sought preliminary and permanent injunctive relief and monetary damages. The *Epstein* Action complaint, as subsequently amended, named as defendants MCA, Matsushita, Matsushita Acquisition, Matsushita Holding, and Wasserman and Sheinberg . . . .

* * *

During December 1990 and January 1991, four purported class actions, brought on behalf of MCA shareholders, were filed in the Federal District Court, entitled *Linder v. MCA INC., et al.*, No. CV-90-6744-KN (filed on December 18, 1990) (the "*Linder* Action"); *Rockford v. MCA INC., et al.*, No. CV-90-6744-JMI (filed on December 18, 1990) (the "*Rockford* Action"); *Karlin, et al. v. MCA INC., et al.*, No. CV-90-6775-R (filed December 18, 1990) (the "*Karlin* Action"); and *Minton v. MCA INC., et al.*, No. CV-91-0336-R (filed on January 17, 1991) (the "*Minton* Action"). The *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action assert substantially similar claims and seek substantially similar relief as the claims asserted and the relief sought in the *Epstein* Action. Unless otherwise indicated, the *Epstein* Action, the *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action—all of which were consolidated by the Federal District Court on April 1, 1991—are collectively referred to herein as the California Federal Actions, and the plaintiffs in the California Federal Actions are hereinafter referred to as the "Federal Plaintiffs" . . . .

A 6-7, 14-15.

3. The Delaware Settlement also expressly stated that these actions were on appeal in this Court. *See* A 17-18.

Appendix H

SEC Rule 14d-10, 17 C.F.R. § 240.14d-10:

§ 240.14d-10 Equal treatment of security holders.

(a) No bidder shall make a tender offer unless:
(1) The tender offer is open to all security holders of the class of securities subject to the tender offer, and
(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

(b) Paragraph (a)(1) of this section shall not:
(1) Affect dissemination under Rule 14d-4 (§ 240.14d-4); or
(2) Prohibit a bidder from making a tender offer excluding all security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the bidder to comply with such statute.

(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided*, That:
(1) Security holders are afforded equal right to elect among each of the types of consideration offered; and
(2) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

(d) If the offer and sale of securities constituting consideration offered in a tender offer is prohibited by the appropriate authority of a state after a good faith effort by the bidder to register or qualify the offer and sale of such securities in such state:
(1) The bidder may offer security holders in such state an alternative form of consideration; and
(2) Paragraph (c) of this section shall not operate

to require the bidder to offer or pay the alternative form of consideration to security holders in any other state.

(e) This section shall not apply to any tender offer with respect to which the Commission, upon written request or upon its own motion, either unconditionally or on specified terms and conditions, determines that compliance with this section is not necessary or appropriate in the public interest or for the protection of investors.

Appendix I

Section 14(d)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(d)(7):

Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

Appendix J

Pertinent Excerpts From the Stock Purchase Agreement filed with the Securities and Exchange Commission referenced in *Kahn v. Virginia Retirement System*, 783 F. Supp. 266 (E.D. Va. 1992), *aff'd*, 13 F.3d 110 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994):

STOCK PURCHASE AGREEMENT BETWEEN NORTHERN VENTURES HOLDING CORP., RICHMOND-WASHINGTON COMPANY AND VIRGINIA RETIREMENT SYSTEM (submitted as exhibit to SEC Schedule 14D-1 filed August 30, 1991 by Virginia Retirement System and System Holdings, Inc.)

Shares of Capital Stock of RF&P Corporation
Dated as of August 28, 1991

VRS and System Holdings, Inc, a Virginia corporation ("SHI") and a wholly-owned Subsidiary of VRS, are also entering into an agreement with RF&P pursuant to which SHI intends to offer to purchase all of the outstanding capital stock of RF&P held by all shareholders of RF&P other than VRS and the corporate affiliates of CSXT (the "Offer"). SHI's obligation to consummate the Offer is conditioned upon the satisfaction of all conditions to closing under this Agreement and the Asset Purchase Agreement.

p. 2.

* * *

The obligation of VRS to consummate the transactions contemplated by this Agreement shall be subject, to the extent not waived, to the following conditions . . .

6.9 The Offer. All conditions to the obligations of SHI to commence the Offer and *to accept for payment the shares of capital stock of RF&P pursuant thereto shall have been satisfied or waived and SHI shall have accepted for payment the shares of capital stock validly tendered pursuant to the Offer.*

p. 11-12 (emphasis added).